No. 88-1725-CFX
Status: GRANTED

Title: Juan Francisco Venegas, Petitioner
v.
Michael R. Mitchell

Docketed:
April 24, 1989

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Bromberg,Michael S., Mosk,Richard M

Counsel for respondent: Mitchell,Michael R., Miller,Charles A.

Entry	Date	Note	Proceedings and Orders
1	Apr 24 1989	G	Petition for writ of certiorari filed.
3	May 18 1989		Order extending time to file response to petition until June 24, 1989.
4	Jun 23 1989		Brief of respondent Michael Mitchell in opposition filed.
5	Jun 27 1989		DISTRIBUTED. September 25, 1989
6	Jul 6 1989	X	Reply brief of petitioner Venegas filed.
7	Oct 2 1989		Petition GRANTED.
			**********
8	Oct 18 1989	G	Motion of petitioner to dispense with printing the joint appendix filed.
9	Oct 30 1989		Motion of petitioner to dispense with printing the joint appendix GRANTED.
11	Nov 16 1989		Brief of petitioner Venegas filed.
12	Dec 8 1989		Record filed.
		*	Certified copy of C. A. Proceedings received.
14	Dec 14 1989		Record filed.
		*	Certified copy of original record, box, received.
13	Dec 15 1989		Brief of respondent filed.
15	Dec 16 1989		Brief amici curiae of Saperstein & Seligman, et al. filed.
16	Dec 20 1989		Lodgings received. (Box).
17	Jan 3 1990	X	Reply brief of petitioner Venegas filed.
18	Jan 5 1990		SET FOR ARGUMENT WEDNESDAY, FEBRUARY 21, 1990. (1ST CASE)
19	Jan 5 1990		CIRCULATED.
20	Feb 21 1990		ARGUED.

88- 1725

Supreme Court, U.S.
FILED
MAR 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JUAN FRANCISCO VENEGAS,

Petitioner,

v.

MICHAEL R. MITCHELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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53 pp

QUESTIONS PRESENTED

Petitioner, Juan Francisco Venegas, and Respondent, Michael R. Mitchell, entered into a contingent fee agreement for Mr. Mitchell to represent Mr. Venegas in the trial of a pending civil rights action. The agreement called for a non-refundable cash retainer of $10,000 applied against the greater of either a court awarded fee or 40% of the "recovery". After trial, a judgment was rendered in the amount of $2,080,000 and attorney's fees were awarded pursuant to 42 U.S.C. § 1988 in the amount of $117,000.

Thereafter, Mr. Mitchell, claiming his work was done, refused to defend the judgment on appeal without additional compensation and filed a motion to intervene* seeking a lien against any recovery. Mr. Venegas responded that under both Federal and California law the "reasonable fee" previously determined by the court was the only fee to which Mr. Mitchell was entitled.

The issues presented therefore are:

1. Did Congress, in passing Civil Rights Attorney's Fee Awards Act of 1976 (42 U.S.C. § 1988) intend that the "reasonable fee" awarded under § 1988 be merely a credit against larger contingent fee?

2. If Congress did so intend, can an attorney in a pure civil rights case, consistent with his fiduciary duty to his client, insist on the enforcement of a contingent fee agreement without having disclosed to the client the benefits he has under 42 U.S.C. § 1988 when the agreement was made?

3. Can a Federal court enforce a contingent fee agreement in a civil rights case in a manner which is contrary to the public policy as expressed by the highest court in the state in which the court sits?

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* When Mr. Mitchell refused to defend the judgment on appeal, unless Mr. Venegas agreed to pay him an additional 10% of the "recovery", Mr. Venegas called present counsel, in Sag Harbor, New York, for help because present counsel had represented Mr. Venegas on the appeal of his conviction for first degree murder which the California Supreme Court reversed on the ground of insufficiency of evidence.

LIST OF PARTIES NOT OTHERWISE NOTED IN THE TITLE

The parties defendant in the lawsuit when Mr. Mitchell made this motion to intervene were Long Beach police officers Ronnie J. Skaggs and Carthel Roberson.

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No.

IN THE

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OCTOBER TERM, 1988

JUAN FRANCISCO VENEGAS,

Petitioner,

v.

MICHAEL R. MITCHELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Juan Francisco Venegas, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The original opinion of the United States Court of Appeals for the Ninth Circuit is reported on Westlaw at 867 F.2d 527, however, it is not known at this time if the amended opinion will retain the same citation. The amended opinion is reprinted in the appendix hereto, p. A-1 *infra*.

The memorandum of decision and order, filed January 23, 1987, and the correcting order, filed February 9, 1987, of the United States District Court for the Central District of California are not reported. They are reprinted in the appendix hereto at p. A-18 and p. A-31 *infra* respectively.

JURISDICTION

Petitioner filed his complaint alleging violations of 42 U.S.C. § 1983 and § 1985. Jurisdiction was proper in the district court pursuant to 28 U.S.C. § 1343. Respondent filed his motion to intervene invoking the court's ancillary jurisdiction.

The United States Court of Appeals for the Ninth Circuit exercised jurisdiction of the final order of the district court pursuant to 28 U.S.C. § 1291.

The Ninth Circuit filed its judgment on January 31, 1989. On February 13, 1989, Petitioner filed a timely petition for rehearing and a suggestion for rehearing *en banc*. The petition for rehearing was denied, and the suggestion for rehearing *en banc* was rejected, on April 4, 1989.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved is the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988. It is reprinted in the appendix hereto at p. A-32 *infra*.

STATEMENT OF THE CASE

On December 25, 1971, Petitioner, Juan Francisco Venegas (hereinafter Mr. Venegas), was arrested along with one Lawrence Reyes for murder of William Staga. After a trial by jury, they were convicted and sentenced to life in prison. The California Supreme Court reversed Mr. Venegas' conviction on the ground of insufficiency of evidence in *People v. Reyes*, 12 Cal. 3d 486,

116 Cal. Rptr. 217, 526 P.2d 225 (1974). Mr. Venegas was released from State Prison on October 28, 1974.

Thereafter, Mr. Venegas filed a State court tort action against several Long Beach police officers and on October 28, 1977, Mr. Venegas filed a complaint in Federal court under 42 U.S.C. § 1983 and § 1985 against these Long Beach police officers alleging the use of perjured evidence. On July 6, 1981, the district court granted summary judgment on the ground that the action was barred by the statute of limitations. The Ninth Circuit reversed in *Venegas v. Wagner*, 704 F.2d 1144 (9th Cir. 1983).

Mr. Venegas approached Respondent, Michael R. Mitchell (hereinafter Mr. Mitchell), in September of 1985, to represent him in his Federal law suit after the reversal of a State court judgment in Mr. Venegas' favor for $1 million, and after his then attorney, by letter dated August 30, 1985, told Mr. Venegas to find another lawyer.

At that time the trial was set to begin November 5, 1985. Mr. Venegas agreed to pay Mr. Mitchell $10,000 as a non-refundable retainer and 40% of the gross amount recovered. Mr. Mitchell at no time advised Mr. Venegas of the substantial nature of the fees provided by § 1988 nor did he explain to him that the Civil Rights Attorney's Fee Awards Act had been passed to afford him an attorney at no cost to himself. Mr. Venegas was told that the § 1988 fees would belong to Mr. Mitchell if awarded by the court and they could not be waived by Mr. Venegas.

Mr. Venegas and Mr. Mitchell discussed the possibility of appeal. The contract provided for one trial only. Mr. Mitchell told Mr. Venegas that he might not want Mr. Mitchell to handle an appeal if he lost the trial. Mr. Venegas entered into the fee agreement with the understanding that Mr. Mitchell would handle an appeal to defend a judgment because Mr. Mitchell would then be fighting for his own money as well as the client's. In addition, he understood that by conditioning the 40% on recovery, Mr. Mitchell would be taking his fee out of the money Mr. Mitchell recovered.

Subsequent to the signing of the fee agreement, Mr. Venegas agreed that the Law Offices of Johnnie L. Cochran, Jr. could

be associated with Mr. Mitchell and they would share fees on a 50-50 basis.

Trial resulted in a judgment for $2 million in general damages and $40,000 punitive damages against each of three officers (subsequently two officers because of the grant of a motion for j.n.o.v.). Mr. Mitchell and his associate continued to represent Mr. Venegas in post trial matters in the district court after the filing of notices of appeal. However, Mr. Mitchell, relying on the "one trial only" provision in the agreement, demanded another 10% of the recovery to defend the judgment on appeal.

On August 14, 1986, the district court filed its findings of fact and conclusions of law with regard to Mr. Venegas' motion for attorneys' fees. The court found the reasonable value of the legal services of Mr. Mitchell to be $75,000. (216 4 hours times $175 per hour, for a lodestar of $37,870.00 multiplied by two for the excellent result after noting the contingent nature of the case.) The court also found the reasonable value of the legal services of Mr. Mitchell's trial associate to be $27,000. (125.6 hours times $150 per hour, multiplied by one point five) Defendants filed a notice of appeal from that order on September 11, 1986.

On September 23, 1986, Mr. Mitchell moved the district court for leave to intervene to confirm a lien for his services based on a contingent fee agreement.

Mr. Venegas responded, through present counsel because of the conflict of interest of the attorneys of record, that under both Federal law and California[1] law the trial attorneys were

[1] In *Fracasse v. Brent*, 6 Cal. 3d 787, 100 Cal. Rptr. 385, 494 P.2d 9 (1972), the California Supreme Court declared that implied by law into every contract of employment between an attorney and a client is the right of the client to terminate the contract at will. The court held that an attorney with a contingency fee agreement can be discharged before the contingency occurs, with or without cause, and is entitled to recover only the reasonable value of his service. The closest California case on point seems to be *Moore v Fellner*, 50 Cal. 2d 330, 325 P.2d 857, where the contingent agreement was limited "to the conclusion of these two cases in the Superior Court". The California Supreme Court limited the fee to the reasonable value of the work done before the attorney demanded the $2,000 to defend the appeal.

entitled to no greater fees than those previously determined by the court to be reasonable pursuant to 42 U.S.C. § 1988.

On January 29, 1987, the district court entered its order denying Mr. Mitchell's right to intervene to confirm a lien. The court went on to refuse to exercise its discretion to limit trial counsel's attorneys' fees to the § 1988 award.

On February 23, 1987, Mr. Venegas filed notice of appeal (Docket No. 87-5662) from so much of the order as refused to reduce the fees of the former attorneys to the § 1988 award.

On February 24, 1987, Mr. Mitchell filed notice of appeal. (Docket No. 87-5684) (On November 9, 1987, the Ninth Circuit affirmed the original judgments of the trial court with respect to the damages, the j.n.o.v., and the attorneys' fee pursuant to § 1988. *Venegas v Wagner*, 831 F.2d 1514 (9th Cir. 1987))

In the Ninth Circuit, Mr. Venegas took the position that trial counsel were entitled to no greater fee than the § 1988 fee. He argued that the Ninth Circuit case of *Hamner v. Rios*, 769 F.2d 1404 (9th Cir. 1985) was inconsistent with Congressional intent in passing § 1988 and with this Court's precedents. Mr. Venegas further argued that even if the *dicta* in *Hamner*, allowing the court to make the plaintiff pay the difference between the § 1988 fee and a contingent fee agreement, was good law, this case fell under the "vast disparity" reasoning of that opinion as to when the agreement should not be enforced. In addition, it was argued that even if a client could make an agreement to pay a fee greater than the § 1988 fee, there should at least be a showing that: a) the attorney explained the purpose of § 1988 to the client; and b) the client knowingly waived the benefits of having all his fees paid by the defendants. The California law on fee agreements was also argued.

On January 31, 1989, the Ninth Circuit reversed the district courts denial of the motion to intervene and affirmed that court's refusal to reduce the contingent fee to the fee awarded pursuant to § 1988. On February 13, 1989, Petitioner filed a timely petition for rehearing and a suggestion for rehearing *en banc*.

Subsequently, this Court decided *Blanchard v. Bergeron*, 109 S.Ct. 939 (1989). By letter and motion to augment the petition for rehearing and suggestion for rehearing *en banc*, Petitioner argued the reasoning in *Blanchard* in support of his position.

The petition for hearing was denied and the suggestion for rehearing *en banc* was rejected on April 4, 1989.

A timely motion to stay the issuance of the mandate was filed on April 6, 1989.

REASONS FOR GRANTING WRIT

I

THERE IS A DIRECT AND INTOLERABLE CONFLICT AMONG THE CIRCUITS ON AN IMPORTANT ISSUE OF FEDERAL STATUTORY INTERPRETATION

a. The Conflict

There is a conflict among the Circuits with regard to the interpretation of The Civil Rights Attorney's Fee Awards Act of 1976 (42 U.S.C. § 1988). The conflict is direct in that it is clear that this case would be decided differently in other Circuits and it is intolerable because it is also clear that the improper interpretation of the statute is depriving citizens of their rights in certain Circuits.

The conflict in interpretation can be seen between those Circuits that view the intent of Congress in enacting § 1988 primarily to provide incentive for attorneys to take civil rights cases and those Circuits that properly construe the purpose as providing for the civil rights plaintiffs, acting as a "private attorney general" a means of recovering what it costs them to enforce the civil rights laws.

The Third, Eighth and Ninth Circuits stress attorney incentive and, relying on the use of the common law contingent fee

agreements, allow the client to pay the difference between the "reasonable fee" awarded under 42 U.S.C. § 1988 and a greater fee which is provided for in the agreement. The Second and Tenth Circuits recognize the civil rights plaintiff as one acting as a private attorney general and use the lodestar method in calculating the reasonable fee and award that fee in satisfaction of the client's fee obligation whether it is more or less than the fee called for in the contingent fee agreement.[2]

In 1982, the Second Circuit decided *Wheatley v Ford*, 679 F.2d 1037, 1040-1041 (2d Cir. 1982) which held that "to the extent counsel receives payment of the section 1988 statutory award, his claim for services rendered under his fee arrangement with his client shall be deemed paid and satisfied. This result gives full effect to the Congressional desire to promote private enforcement by allowing citizens 'the opportunity to recover what it costs them to vindicate these rights in court'." 679 F.2d at 1041 (Citation omitted.)

In 1983, the Third Circuit decided *Sullivan v. Crown Paper Bd. Co. Inc.*, 719 F.2d 667, 669-670 (3d Cir. 1983). That case noted the Second Circuit holding in *Wheatley*, but went on to decide "Should the contingency fee be greater, plaintiff should be directed to pay to counsel only the difference between the statutory award and the contingent fee." 719 F.2d at 670.

Four days latter, on October 24, 1983, the Tenth Circuit, *en banc*, decided the best reasoned case on the subject, *Cooper v. Singer*, 719 F.2d 1496 (10th Cir. 1983) (*en banc*). The court decided that the conclusion of its panel, that the contingent fee agreement set an upper limit on the § 1988 award, was incorrect in light of this Court's then recent decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The court went on to decide the "reciprocal

[2] *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986) presents another approach. It notes the conflict in other Circuits and states that Congress intended that the plaintiff not have to pay the attorney. Then, it allows the court to chose between a percentage of the recovery fee or an hourly fee, for determining the fee under § 1988, based on the kind of civil rights case.

issue: the impact of the client's fee award on the attorney-client fee arrangement" and decided, "We are inclined to believe that Congress expected section 1988 fee awards to fulfill the client's fee obligation to his attorney." 719 F.2d at 1504.

In 1985, the Ninth Circuit decided *Hamner v. Rios*, 769 F.2d 1404 (9th Cir. 1985). The Ninth Circuit noted the ruling of *Sullivan*, refused to follow *Wheatley*, or *Cooper*, but instead determined: "If the award . . . is less than the contingent fee, the court may consider whether the plaintiff should be compelled to pay the difference between the statutory amount and the contingent fee." 769 F.2d at 1409. In the case at bar Ninth Circuit, upheld the trial court's ruling that Mr. Mitchell's fees were not limited to the § 1988 award, following *Hamner* and also cited *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 923 (8th Cir. 1986) in which the Eighth Circuit rejected *Cooper* and *Wheatley* and followed *Hamner*.

To add to the confusion in the Circuits, if the case at bar where brought in the Eleventh Circuit, a court following *Pharr v. Housing Authority*, 704 F.2d 1216 (11th Cir. 1983), if it found the fee agreement reasonable, would make the defendant pay that amount.

The Ninth Circuit in the case at bar cited *Cooper* for its statement that there was sparse congressional guidance on the issue of the effect of a § 1988 fee on a contingent fee agreement. It is suggested that there is ample authority in the Congressional Record to support *Cooper* and *Wheatley*.

In the Senate, the Judiciary Committee report stated: "If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, *then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.*" (Emphasis added.) Senate Report No. 94-1011, (1976) page 2.

Speaking of the bill in the Senate, Senator Tunney, who sponsored the bill in its original form, made it clear that the plaintiff was to pay no fee when he said: "When Congress calls upon

> citizens . . . to go to court to vindicate its policies and benefit the entire Nation, Congress must also ensure that they have the means to go to court, and to be effective once they get there. *No one expects a policeman, or an officeholder, to pay for the privilege of enforcing the law. It should be no different for a private citizen. . . .*" (Emphasis added.) 122 Cong. Rec. 33313. After quoting from the First Circuit case of *Knight v. Auciello* 453 F. 2d 852 (1st Cir. 1972), the Senator continued, "We cannot hope for vigorous enforcement of our civil rights laws unless we, in the words of the Knight court *'remove the burden from the shoulders of the plaintiff seeking to vindicate the public right.'* That is what this bill does and why it is so vital." (Emphasis added.) 122 Cong. Rec. 33314.

That the bill was intended to attract private attorneys by providing only reasonable compensation to the attorneys was spelled out by Senator Kennedy, the sponsor of the bill that was passed. He took exception to those of his colleagues who called the bill "a lawyer's bill". He stated: "Even with enactment of this bill,

> the lawyer who undertakes to represent a client will face more uncertainty of payment than one involved in a usual contingent fee case. *His fee is contingent not only upon his success, but also on the discretion of the judge before whom he appears.*
>
> "Even if he wins his case and the judge decides he has won a fee as well, *his rate of compensation is fixed not by a grateful client, but by a disinterested judge.* In the traditional contingency case, the lawyer is assured of a high percentage of a monetary award should he win. If the proponents of this bill were interested in creating a relief fund for lawyers, they would have surely gone about it in a different way.
>
> "*No, this bill is not for the purpose of aiding lawyers. The purpose of this bill is to aid civil rights.* (Emphasis added.) 122 Cong. Rec. 33314.

b. The importance of the issue.

According to the *Annual Report of the Director of the Administrative Office of the United States Courts* for the year ending June 1988, there were 16,966 private civil rights cases filed in the Federal courts (Table C3 at page 27). For the year ending June 30, 1987, there were 17,342 total private civil rights filings (*Annual Report of the Director*, Table C3, at page 185). A ruling on the proper relationship between a contingent fee agreement and the fee awarded by the court pursuant to § 1988 is crucial to the determination of the rights of the clients and their attorneys in those cases that are still in the Federal Court system as well as those that will be filed in the future.

An idea of the importance of the issue can also be gleaned from the fact that this Court this term decided *Blanchard v. Bergeron*, __ U.S. __, 109 S. Ct. 939, in which the issue was whether the contingent fee was a limit on the § 1988 fee. As the *Cooper* court said, after it decided the same issue as this Court decided in *Blanchard*, "At this point, however our inquiry is but half finished." 719 F.2d at 1503. It is respectfully suggested that like the court in *Cooper*, it is time for this Court to "examine the reciprocal issue: the impact of the client's fee award on the attorney-client fee arrangement." *ibid*. Only this Court can resolve the conflict in the Circuits and see that clients and attorneys are treated fairly throughout the country.

II

THERE IS A CONFLICT BETWEEN THIS CASE AND THE REASONING OF THIS COURT'S PRECEDENTS

In *Hensley v. Eckerhart*, 461 U.S. 424 this Court said "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." 461 U.S. at 435. The concurring and dissenting opinion spoke of Congress' intent to enforce the civil rights laws "by continuing to rely on the private bar and making the defendants bear the full burden of paying for their civil rights obligations." 461 U.S. at 446. In the case at bar

if the district court awarded a fully compensatory fee under § 1988, and therefore the defendants have borne the full burden, the Ninth Circuit is incorrect in allowing Mr. Venegas to pay more.

In the recent case of *Blanchard v. Bergeron*, 109 S.Ct. 939 (1989) this Court said:

> "As we understand § 1988's provisions for allowing a 'reasonable attorney's fee,' it contemplates reasonable compensation, in light of all the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, no more and no less. Should a fee agreement provide less than a reasonable fee calculated in this manner, the defendant should nevertheless be required to pay the higher amount. The defendant is not, however, required to pay the amount called for in a contingent fee contract if it is more than a reasonable fee calculated in the usual way. It is true that the purpose of § 1988 was to make sure that competent counsel was available to civil rights plaintiffs, and it is of course arguable that if a plaintiff is able to secure an attorney on the basis of a contingent or other fee agreement the purpose of the statute is served if the plaintiff is bound by his contract. On that basis, however, the plaintiff should recover nothing from the defendant, which would be plainly contrary to the statute. And Congress implemented its purpose by broadly requiring all defendants to pay a reasonable fee to all plaintiffs, if ordered to do so by the court. *Thus it is that plaintiff's recovery will not be reduced by what he must pay his counsel. Plaintiffs who can afford to hire their own lawyers, as well as impecunious litigants, may take advantage of this provision.*" 109 S. Ct. at 944 (Emphasis added.)

The Court went on to say: "Accordingly, fee awards, properly calculated, by definition will represent the reasonable worth of the services rendered on vindication of a plaintiff's civil rights." 109 S.Ct. at 946 Thus, this Court seems to be restating its position that the § 1988 fee should be fully compensatory.

This Court stated that the defendant should not pay more than the reasonable fee determined by the lodestar method. The Ninth Circuit failed to reason from that statement that if a fee greater than the § 1988 fee is unreasonable for the defendant, who is supposed to be punished by the fee statute, it is unreasonable for a civil rights plaintiff, for whose benefit the law was enacted. The Ninth Circuit failed to grasp that it is not up to one class of "private attorneys general" to provide the incentive the Ninth Circuit thinks attorneys need. Moreover, it is illogical to make the most severely damaged civil rights plaintiffs forego the protection of a statute, intended to give all civil rights plaintiffs the whole of their damages, by making these more gravely damaged plaintiffs pay an amount greater than the court would make the defendant pay in order to provide incentive to attorneys, who have an ethical duty to uphold civil rights in the first place.

Given this Court's reasoning that the § 1988 fee is designed to prevent a windfalls, (109 S.Ct. at 946) the Ninth Circuit failed to recognize that a windfall is a windfall no matter on which side of the "v." the wind rises.

Further, if the statement that "a plaintiff's recovery will not be reduced by what he must pay his counsel," is to be true in all circumstances then either the court would have to award the contractual fee, which this Court rejected, or the attorney's fee would have to be reduced to what the court determines to be reasonable pursuant to § 1988. By limiting an attorney's fee to the reasonable fee, determined in the proper manner by a disinterested judge, the court would also avoid the "special incentive to prove damages and shortchange efforts to seek effective injunctive or declaratory relief." 109 S.Ct. at 945

This Court said, "It should be noted that we have not accepted the contention that fee awards in § 1983 damage cases should be modeled upon contingent fee arrangements used in personal injury litigation." and quotes *Riverside v. Rivera*, 477 U.S. 561 for the distinction between a private tort suit and one brought to vindicate civil and constitutional rights. However, the Ninth Circuit affirmed the district court refusal to lower the contingent

fee in part because "Venegas has presented no evidence suggesting that a 40% contingent fee is not standard in California for civil rights cases. . .". Thus, if the Ninth Circuit rule stands, no civil rights plaintiff can take advantage of § 1988 because attorneys will continue to use contingent fee agreements in civil rights cases especially if they think they can get a multiple of what the court thinks is a reasonable fee after doubling their normal fee.

The *Blanchard* case can be seen as standing for the proposition that the reasonable fee determination made at the end of the case supercedes the fee agreement made by the attorney and client at the beginning of their relationship. This is seen from the fact that in *Blanchard*, if the attorney ultimately gets the fees and cost of about $40,000, there will be a judgment in the name of the client and presumably a check for more than $50,000. The client will have to endorse that check and pay over to his attorney more than $40,000 and keep his $10,000 damages notwithstanding the fact that he has a contract with the attorney for the attorney to take only 40% of what the client recovers.

Since in *Blanchard* this Court relieved the attorney of the burden of his bad bargain, it is respectfully suggested it is now time to balance the scales and remove the "burden from the shoulders of the plaintiff seeking to vindicate the public right," as Senator Tunney said the Act would. Only in this way will all civil rights plaintiffs be treated equally and only in this way will the words of Senator Kennedy, that the fee of the attorney is determined by a disinterested judge, be true for all.

CONCLUSION

On the morning of his arrest in Long Beach, California for the murder he did not commit, Mr. Venegas was intending to get up and return to his home in Grand Junction, Colorado. After his release from prison, had he been able to bring his civil rights suit in Colorado, his attorney would be bound by a fiduciary duty to explain the nature of the fee agreement to him, explore options as to different methods for compensating the attorney, and to reduce his fee to what the district court deemed reasonable.

Since Mr. Venegas has not had the benefits Congress sought to convey in enacting the Civil Rights Attorney's Fee Awards Act, because he sued in the Ninth Circuit rather than the Tenth Circuit, this Honorable Court should grant Mr. Venegas' Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals and reverse the judgment of that court.

Respectfully Submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JUAN FRANCISCO VENEGAS,
Plaintiff-Appellant,

v.

RONNIE J. SKAGGS; CARTHEL S. ROBERSON,
Defendants-Appellees.

JUAN FRANCISCO VENEGAS,
Plaintiff-Appellee,

v.

RONNIE SKAGGS, et al.,
Defendants-Appellees.

MICHAEL R. MITCHELL,
Applicant-in-Intervention-Appellant.

Nos. 87-5662; 87-5684

D.C. No. CV-77-4047-RJK

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Robert J. Kelleher, District Judge, Presiding

Argued and Submitted
May 2, 1988—Pasadena, California

Filed January 31, 1989
Amended April 4, 1989

Before: Procter Hug, Jr., Betty B. Fletcher and Jerome Farris, Circuit Judges.

Opinion by Judge Fletcher

SUMMARY

Attorneys' Fees/Courts and Procedure

Affirming a judgment that an attorney's entitlement to attorney's fees is not limited to a 42 U.S.C. § 1988 award and that a 40% contingency fee is reasonable, the court reversed a denial of the attorney's intervention motion holding that all the considerations which guide the exercise of judicial discretion weigh in favor of permissive intervention.

Attorney Michael Mitchell appeals the district court's denial of his motion to intervene in his former client's 42 U.S.C. § 1983 action. Mitchell moved to intervene in order to confirm a $406,000 lien for attorney's fees on the judgment. Appellant Juan Francisco Venegas, the former client, cross-appeals the district court's ruling that Mitchell's entitlement to attorney's fees is not limited to the section 1988 award of $75,000.

[1] Since the court concluded that the district court erred in denying Mitchell permissive intervention, the court did not decide whether Mitchell is entitled to intervention as of right. [2] A court may grant permissive intervention under Rule 24(b) only if three conditions are met. The court found that the "common question of law or fact" requirement had not been met. [3] The existence of a common question of law or fact does not automatically entitle an applicant to intervene. In this case, however, all of the considerations which guide the exercise of judicial discretion weighed in favor of permissive intervention. [4] A statutory award under section 1988 does not set a ceiling on an attorney's entitlement under a contingent fee contract. [5] A rule limiting an attorney's fees under a contingent agreement to the statutory award would be inconsistent with Congress's goal of promoting respect for civil rights by enhancing "the arsenal" available to plaintiffs in civil rights cases. A rule that limits attorneys' entitlements

under contingent fee agreements to statutory awards would discourage attorneys from agreeing to represent civil rights plaintiffs. [6] If the court accepted Venegas's argument that contingent fees may never exceed statutory awards, this court would in effect be eliminating this category of civil rights cases. [7] The Supreme Court's holding on waivers of attorney's fees awards under section 1988 also supports this court's view. [8] The district court found that Mitchell's contingent fee was reasonable because it reflected the risk of nonrecovery he assumed in accepting this case. There is no basis in the record to support a ruling that the district court abused its discretion in making this finding.

COUNSEL

Michael S. Bromberg, Sag Harbor, New York, for the plaintiff-appellant.

Michael R. Mitchell, Los Angeles, California, in pro per, and intervenor-appellant.

Harvey A. Schneider, Encino, California, for the applicant-in-intervention-appellant.

ORDER

Michael Mitchell's letter is treated as a motion for reconsideration of opinion filed January 31, 1989 and is denied except for the following four corrections.

1. The designation of counsel is corrected as follows:

   Michael S. Bromberg, Sag Harbor, New York, for the plaintiff-appellant.

Michael R. Mitchell, Los Angeles California in pro per, and intervenor-appellant.

Harvey A. Schneider, Encino, California for applicant-in-intervention-appellant.

2. At page 804, the sentence "The contingent fee agreement Venegas and Mitchell entered into provided Mitchell with a $10,000 retainer and a contingent fee of 40% of the 'gross amount recovered,' less the retainer and any costs already paid." is corrected to read, "The contingent fee agreement Venegas and Mitchell entered into provided Mitchell with a $10,000 retainer and a contingent fee of 40% of the 'gross amount recovered,' less the retainer."

3. At page 810, note 5: replace "The Supreme Court recently granted certiorari in *Blanchard*. 108 S. Ct. 2869 (1988)." with "The Supreme Court in *Blanchard* held that, while a contingency fee agreement is a relevant 'factor' in determining a reasonable award under Section 1988, '[t]he trial judge should not be limited by the contractual fee agreement between plaintiff and counsel.' *Blanchard v. Bergeron*, 57 U.S.L.W 4191, 4193 (2/21/89)."

4. At page 810, footnote 6, the following is deleted: "Mitchell argues that a district court never has the authority to review a contingent fee that exceeds a statutory award. We disagree."

With these amendments, the panel has voted to deny the petition for rehearing. The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

FLETCHER, Circuit Judge:

Attorney Michael Mitchell ("Mitchell") appeals the district court's denial of his motion to intervene in his former client's Section 1983 action. Mitchell moved to intervene in order to confirm a $406,000 lien for attorney's fees on the judgment. Juan Francisco Venegas ("Venegas"), the former client, cross-appeals the district court's ruling that Mitchell's entitlement to attorney's fees is not limited to the 42 U.S.C. § 1988 award of $75,000. We exercise jurisdiction pursuant to 28 U.S.C. § 1291. We hold that the district court abused its discretion in denying Mitchell's intervention motion, and remand the case to the district court for a determination of the merits of Mitchell's motion to confirm a lien. We affirm the district court's ruling that Mitchell's entitlement to attorney's fees is not limited to the § 1988 award and that a 40% contingent fee is reasonable in this case.[1]

I.

Mitchell successfully represented Venegas in his Section 1983 action against Long Beach police officers for false arrest and two and one-half years' imprisonment for a murder conviction obtained using perjured evidence. Venegas retained Mitchell in September 1985, three months prior to a scheduled trial date.

[1]The district court reviewed the 40% contingency fee for reasonableness, even though Mitchell is at most entitled to half of the fee because he agreed to share the fee with other attorneys who participated in the case.

The contingent fee agreement Venegas and Mitchell entered into provided Mitchell with a $10,000 retainer and a contingent fee of 40 percent of the 'gross amount recovered,' less the retainer. The agreement also required Mitchell to apply for attorney's fees under 42 U.S.C. § 1988 and to deduct any such recovery from his 40 percent entitlement. It forbade Venegas from waiving Mitchell's right to court-awarded attorney fees, and allowed Mitchell's intervention to protect his interest in the fees:

> Client agrees that Attorney may, at Attorney's election, and at any time, intervene as a party in the action for the sole purpose of protecting Attorney's interest in and to any attorney fee award which may be made by the trial or any appellate court.

The agreement explicitly covered only Mitchell's handling of the trial:

> This agreement covers one trial only. In the event there is a mistrial or an appeal, the parties may mutually agree upon terms and conditions of Attorney's employment, but are not obligated to do so.

On January 8, 1986, Venegas consented in writing to the association of another law firm, with the attorneys to share the contingent fee 50-50.

At a jury trial Mitchell obtained a $2.12 million verdict for Venegas. After post trial motions this award entitled Mitchell to $406,000 under the contingent fee agreement. Mitchell moved for attorney's fees under Section 1988, as required by the fee agreement. The district court awarded attorney's fees of $117,000 directly to Venegas, of which $75,000 was for Mitchell's participation. The court stayed enforcement of the attorney's fees judgment pending appeal. This court has since affirmed the jury verdict and the district court's attorney's fees award. *Venegas v. Skaggs*, 831 F.2d 1514 (9th Cir. 1987).

Venegas refused Mitchell's offer to represent him on appeal for another 10 percent of the judgment, and substituted counsel on September 14, 1986. He maintains that he "fired" Mitchell, notwithstanding the agreement's coverage of "one trial only."

On October 20, 1986 Mitchell filed his motion to intervene for the purpose of confirming a lien on the judgment for attorney's fees under the contingent fee agreement. Mitchell sought intervention as of right under Fed. R. Civ. P. 24(a)(2), and, alternatively, permissive intervention under Fed. R. Civ. P. 24(b)(2). Venegas did not oppose intervention, but claimed Mitchell's fee entitlement is limited to the court-awarded fees.

The district court denied Mitchell's motion to intervene but declined to invalidate the contingent fee agreement, leaving any dispute over the contract terms to a state court action. The court did, however, decide that the difference between the contingent fee and court-award fees is not a "windfall" to which Mitchell is not entitled.

II.

[1] Since we conclude that the district court erred in denying Mitchell permissive intervention, we need not decide whether Mitchell is entitled to intervention as of right. We review the denial of permissive intervention for an abuse of discretion. *Willard v. City of Los Angeles*, 803 F.2d 526, 527 (9th Cir. 1986).

[2] A court may grant permissive intervention under Rule 24(b) only if three conditions are met: (1) the movant must show an independent ground for jurisdiction; (2) the motion must be timely; and (3) the movant's claim or defense and the main action must have a question of law and fact in common. *See Cook v. Pan American World Airways, Inc.*, 636 F.Supp. 693, 698 (S.D.N.Y. 1986)(outlining these requirements). The

district court in the case before us found that it had "jurisdiction to determine the rights of the parties under the contingent retainer agreement as ancillary to its conduct of the principal litigation." The court also did not question the timeliness of Mitchell's motion. However, the court found that the "common question of law or fact" requirement had not been met, since it was "unable to discern any relationship between plaintiff's civil rights claims and Mitchell's claim that, under California law, he is entitled to a lien for attorney's fees under a contingent fee contract."[2]

If the court had limited its rulings in Venegas's action to the merits of his Section 1983 claims, then its finding of no "common question of law or fact" might have been justified. In fact, the court chose to decide a question that was common with, and indeed central to, Mitchell's motion. In the course of hearing Venegas's action, the court decided that Mitchell's entitlement to attorney's fees is not limited under federal law to the Section 1988 award, and that a 40% contingent fee is reasonable in this case. In his motion, Mitchell in effect asked the court to answer two questions: (1) what amount of fees (if any) were due him; and (2) whether he had a right to a lien for that amount. The district court's ruling that the statutory award does not place a ceiling on Mitchell's claim to a contingent fee and that the 40% contingent fee is "reasonable" went a long way toward answering the first question posed by Mitchell's motion.

[2]The district court also indicated that it refused Mitchell's motion to intervene because "California courts have uniformly held that a discharged attorney may *not* intervene in his client's lawsuit to establish or enforce his lien." Since "[i]t is wholly clear that the right to intervene in a civil action pending in a United States District Court is governed by Rule 24 and not by state law," 7C Wright, Miller & Kane, *Federal Practice and Procedure* § 1905, p. 240 (2d ed. 1986), the court should not have relied on California law. The court also suggested that it was declining to decide Mitchell's motion because the "judgment is on appeal [and Mitchell's motion] is [thus] premature." Since the judgment has been affirmed, this reason is no longer valid.

[3] The existence of a common question of law or fact does not automatically entitle an applicant to intervene. Rather, Rule 24(b) necessarily vests "discretion in the district court to determine the fairest and most efficient method of handling a case. . . ." *SEC v. Everest Management Corp.*, 475 F.2d 1236, 1240 (2d Cir. 1972). In this case, however, all of the considerations which guide the exercise of judicial discretion clearly weighed in favor of permissive intervention.

In exercising its discretion to grant or deny permissive intervention, a court must consider whether the intervention will "unduly delay or prejudice the adjudication of the rights of the original parties." Rule 24(b). Neither of the original parties in this case alleged that Mitchell's intervention would cause delay or prejudice to the adjudication of their rights. *Compare California Ex Rel. State Lands Commission v. United States*, 805 F.2d 857, 865-66 (9th Cir. 1986) (permissive intervention proper where plaintiff has not alleged that prejudice will result from the intervention). Indeed, neither of the original parties offered any opposition at all to Mitchell's intervention motion. *See Crumble v. Blumthal*, 549 F.2d 462, 468-69 (7th Cir. 1977) (district court abused its discretion in denying permissive intervention where the requirements for permissive intervention had been met and there was "no evidence" that intervention would prejudice the original parties).

In addition to the interests of the original parties, a court in deciding whether to permit intervention should evaluate whether the movant's "interests are adequately represented by existing parties." *State of California v. Tahoe Regional Planning Agency*, 792 F.2d 775, 779 (9th Cir. 1986). In the case of a former attorney seeking intervention in order to secure rights under a contingent fee agreement, "[n]either of the existing parties is concerned with protecting the [attorney's] interest." *Gaines v. Dixie Carriers, Inc.*, 434 F.2d 52, 54 (5th Cir. 1970)(holding that under such circumstances, former attorney may intervene as of right). Venegas, in fact,

strenuously opposes Mitchell's claim to attorney's fees. In Venegas's view, Mitchell is entitled to at most about a sixth of the fees he demands. Since the district court chose to rule on issues central to Mitchell's claim, it should have allowed Mitchell to intervene so that he could defend his position.

Finally, judicial economy is a relevant consideration in deciding a motion for permissive intervention. *See, e.g., Austell v. Smith*, 634 F. Supp. 326, 335 (W.D.N.C. 1986); *Gordon v. Forsyth County Hosp. Authority, Inc.*, 409 F. Supp. 708, 718-19 (M.D.N.C. 1976), *aff'd in part, vacated in part*, 544 F.2d 748 (4th Cir. 1976). In order to decide Mitchell's motion to confirm a lien, the district court would need to decide whether the contingent fee agreement is valid under California state law[3] and, if so, whether Mitchell and Venegas intended that Mitchell enjoy an equitable lien upon the judgment. *See Centenko v. United California Bank*, 30 Cal.3d 528, 531, 179 Cal. Rptr. 902, 904 (1982)(under California law, a lien for attorney's fees depends upon the intention of the attorney and client in entering their fee agreement). The district court in this case is in the best position to decide these issues. No novel or difficult issues of state law appear to be at issue here, and the district court is well acquainted with the underlying litigation and the parties to this fee dispute. Further, the court has already twice involved itself in the details of Mitchell's and Venegas's fee arrangement: first, when it considered the contingent agreement in awarding attorney's fees under Section 1988, *see Quesada*, 850 F.2d at 540 (1983) (existence of a contingent agreement is a factor to consider in making a fee award), and second, when it found that a 40% contingent fee is "reasonable" in this case. We find the reasoning of the court in *Wood v. Motorola, Inc.*, 587 F. Supp. 531, 532-33 (D. Haw. 1984), persuasive in this case:

[3]Venegas challenges the contingent fee agreement on a number of state law grounds, including fraudulent representation.

> If this court refused to ... exercise jurisdiction [over a discharged attorney's motion for fees, the discharged attorney] would be forced to file a suit in state court. The parties to this action would then face a considerable delay and expense in having [the discharged attorney's] claim determined. They would be required to make a record that would consist of facts and arguments that are already before this court. Finally, the parties would be forced to litigate before a judge who lacks the long experience with this case, and with these parties, that this court has had. Equity, along with judicial economy, dictate that this court employ its ancillary jurisdiction to hear this motion.

We hasten to add that we are not holding that an attorney seeking to defend a contingency fee contract may intervene as of right in the underlying action. *Compare Stockton v. United States*, 493 F.2d 1021, 1023-24 (9th Cir. 1974) (rejecting attorney's right to intervene to assert a claim for attorney's fees in tax refund suit)[4] *with Gaines v. Dixie Carriers, Inc.*, 434 F.2d 52, 53-54 (recognizing dismissed law firm's right to intervene in underlying maritime action in order to protect its contingency fee). The trial court abused its discretion when it denied Mitchell permissive intervention because it chose to address the merits of his contingency fee agreement.

III.

Venegas contends that the district court erred in holding that 42 U.S.C. § 1988 permits a court to recognize an attorney's entitlement under a contingent fee agreement that exceeds the statutory award. We review a district court's interpretation of a statute de novo. *Trustees of Amalgamated*

[4]In *Stockton*, the court noted that it was not deciding "whether as a general proposition an attorney's interest in a fee is a sufficient interest to call for intervention of right under Rule 24(a)(2)." 493 F.2d at 1024.

Insurance Fund v. Geltmen Industries, 784 F.2d 926, 929 (9th Cir. 1986).

[4] As we recognized in *Hamner v. Rios*, 769 F.2d 1404, 1409 (9th Cir. 1985), a statutory award under Section 1988 does not set a ceiling on an attorney's entitlement under a contingent fee contract.[5] However, a district court must review a contingent fee in a civil rights case to ensure that the contingent fee is reasonable.[6] *See id.* ("a contingent fee agreement should be enforced if reasonable"); *see also Wilmington v. J.I. Case Co.*, 793 F.2d 909, 923 (8th Cir. 1986)(recognizing an attorney's claim to $146,667 under a contingent fee agreement where the statutory award was $35,721.25, court expressed approval of the Ninth Circuit's position that "normally the plaintiff should be responsible for . . . the contingent fee amount"); *Pharr v. Housing Authority of City of Prichard*, 704 F.2d 1216, 1218 (11th Cir. 1983)(recognizing an attorney's claim to $9,667 under a contingent fee agreement where the statutory award was $6,570, court reasoned

[5]In *Blanchard v. Bergeron*, 831 F.2d 563, 564 (5th Cir. 1987), the Fifth Circuit held that a Section 1988 award may not exceed the fee provided for in the plaintiff's contingency fee agreement with his attorney. In *Quesada v. Thomason*, 850 F.2d 537, 543 (9th Cir. 1988), we held that a contingency fee agreement cannot justify lowering an otherwise reasonable § 1988 fee. The Supreme Court in *Blanchard* held that, while a contingency fee agreement is a relevant 'factor' in determining a reasonable award under Section 1988, '[t]he trial judge should not be limited by the contractual fee agreement between plaintiff and counsel.' *Blanchard v. Bergeron*, 57 U.S.L.W 4191, 4193 (2/21/89).

[6]It is settled that, since "courts retain supervisory power over the attorney-client relationship [and since] fees are central to that relationship, . . . contingent fee arrangements are . . . subject to the courts' supervision." *Cooper v. Singer*, 719 F.2d 1496, 1505 (10th Cir. 1983). *See Starr v. Bowen*, 831 F.2d 872, 874 (9th Cir. 1987); *Hamner*, 769 F.2d at 1409. *See also Hoffert v. General Motors Corp.*, 656 F.2d 161, 165 (5th Cir. 1981); *Allen v. United States*, 606 F.2d 432, 435-36 (4th Cir. 1979); *Dunn v. H.K. Porter Co. Inc.*, 602 F.2d 1105, 1108 (3rd Cir. 1979); ABA Canons of Professional Ethics, Canon 13 (1908)("A contract for a contingent fee . . . should always be subject to the supervision of a court, as to its reasonableness").

that a review of the district court's findings "indicates nothing unreasonable about the plaintiff's contract or the . . . fee resulting therefrom"). *Compare Sullivan v. Crown Paper Board Co.*, 719 F.2d 667, 670 (3d Cir. 1983)(holding that attorneys are entitled to their full contingent fee, if reasonable, even when that fee exceeds the statutory award).

Since the legislative history of Section 1988 does not specifically address the effect of a statutory award on contingent fees, *see Cooper v. Singer*, 719 F.2d 1496, 1504 (10th Cir. 1983) (en banc) (noting sparse congressional guidance), we must look to Congress' purposes in enacting the fee-shifting provision. Venegas suggests that Congress' purpose in enacting Section 1988 was to guarantee attorneys full compensation for civil rights work. However, the Supreme Court in *Evans v. Jeff D.*, 475 U.S. 717 (1986), rejected a narrow view of Section 1988's purpose. Rather, the Court concluded that Congress enacted Section 1988 in order to "promot[e] respect for civil rights . . . . [by adding fee awards] to the arsenal of remedies available [to a plaintiff] to combat violations of civil rights." *Id.* at 731-32.

[5] We conclude that a rule limiting an attorney's fees under a contingent agreement to the statutory award would be inconsistent with Congress's goal of promoting respect for civil rights by enhancing "the arsenal" available to plaintiffs in civil rights cases. Congress has recognized that civil rights legislation can be effective only if the victims of civil rights abuses are able to attract attorneys to litigate their claims. *See City of Riverside v. Rivera*, 477 U.S. 561, 576-78 (1986) (discussing legislative history of Section 1988). A rule that limits attorneys' entitlements under contingent fee agreements to statutory awards would discourage attorneys from agreeing to represent civil rights plaintiffs. As we noted in *Hamner*,

> To hold that the statutory award is the maximum amount of fees available to counsel, notwithstanding

> a contingent fee arrangement providing for a higher fee, overlooks the basic nature and purpose of contingent fee agreements. *Contingent fee agreements enable plaintiffs with meritorious claims but limited finances to obtain counsel, and they are set to account for the risk of nonrecovery.* If attorneys begin to view statutory fees in civil rights cases as inadequate, use of the statutory award as a ceiling on fees could lead to a reluctance to represent civil rights plaintiffs, thus frustrating the intent of Congress.

Hamner, 769 F.2d at 1409 (emphasis added).

The need for private arrangements which "account for the risk of nonrecovery" is greater now than it was when we decided *Hamner*. When *Hamner* was decided, the rule in this Circuit was that courts could factor in "the risk of nonrecovery" in awarding attorney's fees under Section 1988. *See White v. City of Richmond*, 713 F.2d 458, 462 (9th Cir. 1983). In *Pennsylvania v. Delaware Valley Citizens' Council*, 107 S.Ct. 3078 (1987), a plurality held that courts may not consider the risk of nonrecovery in awarding attorney's fees under Section 1988 except possibly in exceptional cases. Justice O'Connor did not join the plurality opinion, but agreed that statutory awards should not be based on "the 'riskiness' of any particular case." *Id.* at 3089. *See Fadhl v. City and County of San Francisco*, 859 F.2d 649, 650 (9th Cir. 1988) (per curiam) (discussing the "majority" holding in *Delaware Valley*).

[6] The plurality in *Delaware Valley* assumed that mechanisms existed outside of statutory awards which encourage attorneys to accept risky civil rights cases. Specifically, the Court contended that its decision to eliminate "risk-enhancement" from Section 1988 awards would not compromise Congress's goal of encouraging competent counsel to represent civil rights plaintiffs because even impecunious plaintiffs may have "*damages* case[s] that competent lawyers would take in the absence of fee-shifting statutes." *Id.* at 3086-87 (emphasis added). If we accepted Venegas's argument that contingent fees may never exceed statutory awards, we would in effect be eliminating this category of civil rights cases.

[7] The Supreme Court's holding on waivers of attorney's fees awards under § 1988 also supports our view that § 1988 does not place a ceiling on an attorney's entitlement under a contingency fee agreement. The Court in *Evans v. Jeff D.*, 475 U.S. 717 (1986), rejected a general proscription against waiving attorney's fees under § 1988 as a condition of settlement of § 1983 suits. If courts must respect the freedom of clients and attorneys to agree that the attorney will receive no § 1988 fee in order to achieve a satisfactory § 1983 settlement, fairness requires that we respect the freedom of clients and attorneys to agree to a contingency fee in excess of a § 1988 award. We should provide wide parameters to the negotiations between attorneys and their clients. *See Evans*, 475 U.S. at 732-34. As with fee waivers, automatic approval is not required. Instead, the district court may only enforce reasonable fee agreements.

Venegas argues that contingent fees in excess of the statutory awards are "windfalls" for civil rights attorneys. It is clear Congress intended that attorneys fees in civil rights cases would be "adequate to attract competent counsel, but [would not be] windfalls to attorneys." S. Rep. No. 94-1011, 94th Cong., 2nd Sess. at 6, U.S. Code & Admin. News 1976, p. 5913. The Second Circuit has limited attorneys' entitlements under contingent agreements to the statutory awards in order to prevent "windfall recoveries for successful attorneys." *Wheatley v. Ford*, 679 F.2d 1037, 1041 (2d Cir. 1982). *See also Sargeant v. Sharp*, 579 F.2d 645, 648 (1st Cir. 1978)(suggesting that "courts are . . . rightly concerned that windfall fees be avoided and that an otherwise reasonable fee not be made excessive by virtue of a fee agreement"). The fear of windfall recoveries, however, is unfounded for two rea-

sons. First, there is no reason to believe that civil rights plaintiffs will routinely compromise their own interests by agreeing to one-sided contingent fee agreements. *See, e.g., Pharr,* 704 F.2d at 1218 (courts should give deference to a contingent fee contract because it "represents [the attorney's and client's] notion of what constitutes a reasonable fee"); *Hagge v. Bauer,* 827 F.2d 101, 111 (7th Cir. 1987)("Our latest decisions have advanced the notion that the contingent fee arrangement should carry considerable evidentiary significance in ascertaining a reasonable fee award"). Second, by reviewing contingent fee agreements for reasonableness, district courts in effect protect civil rights plaintiffs from "windfall recoveries" by their attorneys.[7]

IV.

In this case, we find that the district court did not err in ruling that the contingency fee agreement is reasonable. We review a district court's award of reasonable attorney fees under Section 1988 for an abuse of discretion. *See, e.g., Miller v. Los Angeles Co. Bd. of Education,* 827 F.2d 617, 619 (9th Cir. 1987)(involving 42 U.S.C. § 1988 and 42 U.S.C. § 2000e-5(k)). The same standard applies where a district court reviews the reasonableness of a contingent fee that exceeds the statutory award. *See Krause v. Rhodes,* 640 F.2d 214, 218-19 & n.5 (6th Cir. 1981)(applying an abuse of discretion standard to a district court's review of a contingent fee agreement, the court reasoned that "[w]hile the language of § 1988 [granting district court judges discretion to award a reasonable attorney's fee] does not expressly empower a district court to limit fees derived under a private agreement between the prevailing attorney and his client, it is indicative of the extensive

[7]Where the district court concludes that a contingent fee that exceeds the statutory award is reasonable, the plaintiff may be required to pay the difference between the 1988 award paid by the defendant and the contingent fee. *Hamner,* 769 F.2d at 1409. The plaintiff's attorneys are not entitled to *both* the statutory award and the full amount of the contingent fee.

powers available to district judges in supervising attorney's fees in civil rights cases").

[8] The district court found that Mitchell's contingent fee is reasonable because it reflected the risk of nonrecovery he assumed in accepting this case.[8] We find no basis in the record to support a ruling that the district court abused its discretion in making this finding. Venegas has presented no evidence suggesting that a 40% contingent fee is not standard in California for civil rights cases, or that his particular case posed an unusually low risk for a civil rights case. Moreover, we previously recognized that this case turned on the resolution of a "difficult question of credibility." *Venegas v. Wagner,* 831 F.2d 1514, 1519 (9th Cir. 1987). *Compare Hagge v. Bauer,* 827 F.2d at 112 (upholding statutory award equivalent to a 40% contingency fee in a civil rights case even though the case involved "settled precedent, and no defense of immunity").

CONCLUSION

We conclude that the district court abused its discretion in denying Mitchell's motion to intervene. We remand to the district court to determine the merits of Mitchell's motion to confirm a lien. We affirm the district court's ruling that Mitchell's entitlement to attorney's fees is not limited to the § 1988 award and that a 40% contingent fee is reasonable in this case.

AFFIRMED in part, REVERSED in part, and REMANDED.

[8]In *Hamner,* we recognized that a court has the discretion to consider a number of other factors in determining the reasonableness of a contingent fee, including the gap between the statutory award and the contingent fee and the quality of the attorneys performance. *Hamner,* 769 F.2d at 1409-10. *See also Sears,* 779 F.2d at 1456 (considering attorney's length of participation, level of performance, success, and level of finances as well as "risk of nonrecovery" in deciding reasonableness of a contingent fee in a civil rights case).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JUAN FRANCISCO VENEGAS,

Plaintiff,

v. No. CV 77-4047-RJK

RONNIE J. SKAGGS,
CARTHEL S. ROBERSON,

Defendants.

MEMORANDUM OF DECISION AND ORDER

FACTS

On February 28, 1986, this Court entered Judgment on a jury verdict for plaintiff for $2.12 million in damages against three defendants for violations of 42 U.S.C. section 1983. After post-trial motions were heard, two defendants remained subject to judgment for $2.08 million. Both plaintiff and defendants appealed.

On August 14, 1986, this Court entered judgment awarding plaintiff $117,000 in attorneys' fees under 42 U.S.C. section 1988. Of this, $75,000 was awarded for the work of plaintiff's trial counsel, Michael R. Mitchell. Defendants appealed the judgment for statutory attorneys' fees.

On September 3, 1986, this Court stayed enforcement of the judgment for attorneys' fees pending appeal. Plaintiff appealed the order granting the stay.

On September 14, 1986, attorney Mitchell signed a stipulation withdrawing as plaintiff's counsel of record. Mitchell then filed this motion for leave to intervene for the limited purpose

of confirming a lien on the judgment for attorneys' fees due under a contingent retainer agreement. Plaintiff apparently does not oppose intervention, but claims Mitchell is entitled to nothing under the contingent retainer agreement.

ANALYSIS

I. *Subject Matter Jurisdiction*

Although neither side squarely addresses the issue, this Court must first consider whether it has subject matter jurisdiction to entertain this motion.

A. *Effect of Pending Appeals of Judgment-in-chief and Award of Statutory Attorneys' Fees.*

Ordinarily, the effective filing of a notice of appeal divests the district court of jurisdiction with respect to all matters involved in the appeal. *Grigg v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S. Ct. 400, 402 (1982). This rule is not absolute, however; the Ninth Circuit has held that a district court retains jurisdiction to award attorneys' fees even though an appeal on the merits is pending. *Masalosalo v. Stonewall Insurance Co.*, 718 F.2d 955, 957 (9th Cir. 1985). *See generally Culinary & Service Employees Union v. Hawaii Employee Benefit Admin., Inc.*, 688 F.2d 1228, 1229, 1232 (9th Cir. 1982).

In reaching its decision in *Masalosalo*, the court noted that "[t]he rule of exclusive appellate jurisdiction is a creature of judicial prudence . . . and is not absolute." *Id.* at 956. The purpose of the rule is to avoid the inefficiency of having two courts consider the same issue simultaneously. *Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 200 (9th Cir. 1977). Because an appeal of the judgment-in-chief does not bring the issue of attorneys' fees before the appellate court, no procedural difficulties arise from the district court's determination of attorneys' fees. As the *Masalosalo* court noted, the district court's prompt determination of attorneys' fees can prevent the piecemeal appeals that would result if attorneys' fees could not be awarded until the appeal was decided. *Masalosalo*, 718 F.2d at 956.

In the instant case, a notice of appeal has been filed with respect to both the judgment-in-chief and the award of section 1988 attorneys' fees. The parties now seek a determination by the district court of attorneys' fees under a private contingent retainer agreement. As in *Masalosalo*, there is no danger of simultaneous consideration of the issue by two courts because Mitchell's claim to a lien is not before the appellate court. Moreover, a prompt determination by this Court may permit any appeal taken to be consolidated with the other appeals now pending, thus serving the policy against piecemeal appeals. For these reasons, the Court concludes that the pending appeals of the judgment-in-chief and the award of statutory attorneys' fees do not divest this court of jurisdsiction over the contingent fee agreement between Mitchell and plaintiff.

B. *Mitchell's Standing to Raise his Claim*

Another problem of jurisdictional dimensions arises because Mitchell is not a party to this action and no longer represents plaintiff. Mitchell attempts to overcome this hurdle by moving to intervene pursuant to Fed.R.Civ.P. 24(a) or 24(b). *See* 3B Moore's Federal Practice, § 24.07[2] ("Whether a would-be intervenor has the required interest in the litigation is thus, in part, a question of standing."). Plaintiff does not oppose Mitchell's application to intervene.

1. Intervention as of right

Mitchell first claims that he is entitled to intervene as of right under Fed.R.Civ.P. 24(a)(2). To meet the requirements of Rule 24(a)(2), Mitchell must establish that: (1) his motion to intervene is timely, (2) he has an interest relating to the subject matter of the action, (3) his interest will be impaired by a disposition of the action without his intevention, and (4) existing parties do not adequately represent his interest. *Stockton v. United States*, 493 F.2d 1021, 1022-23 (9th Cir. 1974).

Although Mitchell claims that his interest in his fee is an interest relating to the subject matter of the action and that it

will be impaired by disposition of the actioin without intervention, he cites no authority to support his position. However, at least one court has held that an attorney's interest in securing fees under a contingent retainer agreement satisfies the requirements for invervention as of right under Fed.R.Civ.P. 24(a)(2). *Gaines v. Dixie Carriers, Inc.*, 434 F.2d 52, 54 (5th Cir.1970), *accord Gilbert v. Johnson*, 601 F.2d 761, 767 (5th Cir. 1979).

In *Gaines*, a law firm sought leave to intervene in its client's personal injury diversity action after the client discharged the firm without cause. Intervention was sought for the purpose of protecting the firm's claimed interest in attorneys' fees under a contingent fee contract. *Gaines*, 434 F.2d at 53-54.

The court held that the district court erred in denying leave to intervene. The Fifth Circuit reasoned that:

> it is clear that the appellant law firm here claimed an interest in the subject of the action against [defendants] and is so situated that the final dispositioin of the action may as a practical matter impair or impede its ability to protect that interest. Neither of the existing parties is concerned with protecting appellant's interest.

Id. at 54 (citations omitted).

The Ningh Circuit analyzed the situation differently, however, in *Stockton v. United States*, 493 F.2d 1021 (9th Cir. 1974). In *Stockton*, an attorney sought leave to intervene as of right in his clients' tax refund suit to assert his claim for attorneys' fees. *Id.* at 1022. Prior to the attorney's motion for leave to intervene, however, the parties entered into an agreement providing that a percentage of the judgment equal to the attorney's claimed fee was to be held by plaintiffs' new attorney pending resolution of the fee dispute. The Ninth Circuit held that because the terms of the agreement adequately protected the attorney's interest, a final judgment in the principal case would not affect it. *Id.* at 1023. Thus, the attorney was not entitled to intervene as of right. *Id.*

It should be noted that the Ninth Circuit expressly left undecided the issue of whether an attorney's interest in a fee would ever be sufficient to invoke intervention as of right. *Id.* at 1024. At least one court has held that it is not. *Budro v. Brown & Root, Inc.*, 109 F.R.D. 619, 620 (E.D. Tex. 1986).

In *Gilbert v. Johnson*, 601 F.2d 761 (5th Cir. 1979), the Fifth Circuit summarily followed its earlier decision in *Gainess*. However, Judge Rubin wrote separately to argue that lawyers employed on a contingent basis should not be allowed to intervene in their clients' lawsuits to protect their fees, "at least when they can protect their interest in some other way." *Id.* at 761, 767 (Rubin, J., concurring). Judge Rubin suggested that courts should look to the state law governing the attorney-client relationship to determine what protections are available. *Id.*

Mitchell makes no attempt to establish that each of the four requirements for intervention as of right under Fed.R.Civ.P. 24(a)(2) exist in the instant case. Rather, he appears to argue that because disposition of the action may impede or impair his ability to collect his attorneys' fee, his interest in securing these fees necessarily constitutes an interest relating to the subject matter of the action. He apparently considers it obvious that his motion was timely and that existing parties do not adequately represent his interest, as he makes no mention of these factors.

Mitchell argues that disposition of this action may affect his ability to collect fees because (1) "the parties may settle the action in a manner which could divert funds owed applicant for attorneys' fees," and (2) "other events, such as intervening bankruptcy or filing of different liens, could jeopardize applicant's ability to protect his interest in attorneys' fees." It is manifest, however, that neither of these possibilities can in any way affect Mitchell's rights under the contingent fee contract. Plaintiff and Defendants can do nothing as between them that would affect Mitchell's entitlement to those fees. Moreover, the possibility that other creditors of plaintiff may have an interest in moneys recovered by plaintifif has nothing to do with the disposition of this lawsuit.

This Court finds that Mitchell's rights under a contingent fee agreement have no relationship to the subject matter of this lawsuit. The interest that Mitchell seeks to assert in intervention arises under a contract between two California residents, the terms of which are governed by state law. *See Budro v. Brown & Root, Inc.*, 109 F.R.D. 619, 620 (E.D. Texas 1986). The subject matter of this lawsuit concerns whether defendants violated plaintiff's federal civil rights.

The Court recognizes that Mitchell is concerned not so much with protecting his entitlement to fees under the contract, but rather with assuring that he is in a position to collect the fees before the fund is dissipated. However, even assuming *arguendo* that such an interest constitutes an interest relating to the subject matter of the action, Mitchell is not entitled to intervene under Rule 24(a)(2) if that interest is otherwise adequately protected. *Stockton v. United States*, 493 F.2d 1021 (9th Cir. 1974). As discussed below, California law governing attorneys' equitable liens adequately protects Mitchell's ability to recover his contingent fee.

The Court concludes Mitchell has failed to estabalish that he is entitled to intervene under Rule 24(a)(2).

2. Permissive intervention

Mitchell alternatively asks this Court to allow him to intervene under Fed.R.Civ.P. 24(b)(2), which gives the Court discretion to permit intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." In support of this request, Mitchell merely states that "applicant's claim for a lien for attorney's fees is inextricably bound to the questions of law and fact decided in this action, particularly insofar as they relate to whether plaintiff performed as called for under the retainer agreement." However, this Court is unable to discern any relationship between plaintiff's civil rights claims and Mitchell's claim that, under California law, he is entitled to a lien for attorneys' fees under a contingent fee contract. Accordingly, the Court finds Mitchell is not entitled to intervene under Fed.R.Civ.P. 24(b)(2).

C. *Equitable Power of Federal Court to Supervise Collection of Attorneys' Fees under Contingent Fee Contracts*

Although this Court is not persuaded that Mitchell should be allowed to intervene to assert a claim for attorneys' fees under a contingent retainer agreement, Mitchell alternatively argues that this Court has discretion to determine attorneys' fees under private contracts as "ancillary to its conduct of the principal litigation."

In support of this contention, Mitchell relies on *Moore v. Telfon Communications Corp.*, 589 F.2d 959 (9th Cir. 1978). In *Moore*, the Ninth Circuit recognized and adopted the rule that a federal court has the power to determine fee disputes as ancillary to its conduct of the principal litigation. *Id.* at 967. The court also held, however, that "[w]hether to do so is a matter within the trial court's discretion." *Id.*

Several circuits have recognized the principal that "[a] federal district judge has broad equity power to supervise the collection of attorneys' fees under contingent fee contracts." *Krause v. Rhodes*, 640 F.2d 214, 218 (6th Cir. 1981). *See also Hamner v. Rios*, 769 F.2d 1404, 1409 (9th Cir. 1985); *Cappel v. Adams*, 434 F.2d 1278, 1279 (5th Cir. 1970); *Garrett v. McRee*, 201 F.2d 250, 253 (10th Cir. 1953). The court's determination is reviewable only under an abuse of discretion standard. *Cappel v. Adams*, 434 F.2d 1278, 1280 (5th Cir. 1970).

Accordingly, this Court has jurisdiction to consider whether to determine Mitchell's rights under the contingent fee agreement.

II. *Mitchell's Rights under the Contingent Fee Agreement*

Mitchell argues that under California law, he is entitled to an equitable lien against any recovery in this case. However, plaintiff contends that because this Court has already awarded $75,000 in "reasonable" attorneys' fees under 42 U.S.C. section 1988 for Mitchell's work, Mitchell is entitled to nothing under the contingent retainer agreement.

A. *California Law of Equitable Attorneys' Liens*

On September 18, 1985, plaintiff and Mitchell entered into a contingent retainer agreement under which Mitchell was to represent plaintiff in this action for "one trial only." In return, Mitchell was to receive forty percent of "the gross amount recovered," less a $10,000 retainer. Plaintiff later consented to the association of another attorney in the action; the attorneys were to share fees on a fifty-fifty basis. Plaintiff prevailed at trial and, after entry of judgment on the verdict, retained new counsel to prosecute the appeals. Mitchell thus seeks a lien for twenty percent of plaintiff's recovery less the $10,000 retainer.

California law does not recognize a common law attorney's lien upon a judgment. *Isrin v. Superior Court*, 63 Cal. 2d 153, 45 Cal. Reptr. 320, 403 P.2d 728 (1965); *Hansen v. Jacobsen*, 186 Cal. App. 3d 350, 230 Cal. Rptr. 580, 583 (1986). However, the parties may create an equitable lien by contract. *Isrin*, 63 Cal. 2d at 158-59, 45 Cal. Rptr. 320, 323; *Hansen*, 186 Cal. App. 3d 350, 230 Cal. Rptr. at 583. Although it is not necessary that the work "lien" appear in the contract, the parties must have manifested an intent that the lawyer have a security interest in the judgment. *Cetenko v. United California Bank*, 30 Cal. 3d 528, 531, 179 Cal. Rptr. 902, 904 (1982); *Isrin*, 63 Cal. 2d 153, 45 Cal. Rptr. at 320; *Bartlett v. Pacific Nat'l Bank*, 110 Cal. App. 2d 683, 689, 244 P.2d 91, 94-95 (1952).

California courts have uniformly held that a discharged attorney may *not* intervene in his client's lawsuit to establish or enforce his lien. *Hansen v. Mt. Diablo Unified School Dist.*, 56 Cal. App. 3d 230, 235, 126 Cal. R-tr. 890, 893 (1976); *Hendricks v. Superior Court*, 197 Cal. App. 2d 586, 588-589, 17 Cal. Rptr. 364, 365 (1961). Rather, the attorney must file an independent action. *Id.* The attorney may, however, file a notice of a lien in the client's action, although he is not required to do so to protect his claim. *Cetenko*, 30 Cal. 3d at 533 n.5, 179 Cal. Rptr. at 905 n.5; *Hansen*, 186 Cal. App. 3d 350, 230 Cal. Rptr. at 585.

Once a lien for attorneys' fees is created, its priority is established as of the date the contract was entered into. *Cetenko*,

30 Cal. 3d at 532-536, 179 Cal. Rptr. at 904-907; *Haupt v. Charlie's Kosher Market*, 17 Cal. 2d 843, 846, 112 P.2d 627 (1941); *Hansen*, 186 Cal. App. 3d 350, 230 Cal. Rptr. at 584.

Finally, even though the attorney may have a contractual lien, whether express or implied, he may not seek a determination of the amount due him until the contingency provided for in the agreement has occurred. *Bandy v. Mt. Diablo School Dist.*, 56 Cal. App. 3d 230, 234, 126 Cal. Rptr. 890, 892 (1976).

The contingent retainer agreement at issue in the instant case provides that Mitchell is entitled to a percentage of "the gross amount recovered" in exchange for his representation through "one trial only." The agreement does not create an express lien or security interest. Mitchell argues, however, that the court should find the parties intended to create a security interest. Mitchell claims that this can be implied from "plaintiff's inability to pay attorney fees except from a fund generated by the litigation." However, "[t]his fact alone would not establish a lien or even that the parties contemplated one." *Bartlett v. Pacific Nat'l Bank*, 110 Cal. App. 2d 283, 244 P.2d 91, 95 (1952).

In any event, this Court need not decide whether the contingent retainer agreement at issue gave rise to an implied equitable lien against any recovery. Because the judgment is on appeal and has been stayed pending appeal, Mitchell's request that the Court determine the amount to which he is entitled under the contract is premature. *Bartlett*, 110 Cal. App. 2d 283, 244 P.2d 91, 95.

However, Mitchell has protected his claimed interest in the judgment by filing this motion, thereby giving notice to all parties of his claim. *Hansen*, 186 Cal. App. 3d 350, 230 Cal. Rptr. at 585 (formal filing of notice of lien not required; informal written notice to present attorney while action pending sufficient.) Once plaintiff recovers judgment, Mitchell can bring an action in state court, if necessary, to establish the existence of a lien and to determine the amount to which he is entitled thereunder. *See Hansen*, 186 Cal. App. 3d 350, 230 Cal. Rptr. at 585 n.6 (filing of notice of lien does not of itself affect question of existence

or amount of lien). Accordingly, Mitchell's motion to confirm a lien is DENIED without prejudice to a later assertion of the claim in state court.

B. *Effect of Statutory Award of Attorneys' Fees on Mitchell's Rights under the Contingent Retainer Agreement.*

Plaintiff argues that this Court should exercise its descretion to reduce or eliminate completely the amount to which Mitchell may be entitled under the contingent retainer agreement. Plaintiff relies on the Ninth Circuit's holding in *Hamner v. Rios*, 769 F.2d 1404, 1409 (9th Cir. 1985). In *Hamner*, the court held that where plaintiff is entitled to an award of attorney's fees under 42 U.S.C. section 1988 and is also liable for a higher amount under a contingent fee contract, the district court has discretion to consider whether plaintiff should be compelled to pay the difference between the statutory award and the sum provided for by contract. *Id.*

Mitchell counters that the true thrust of the *Hamner* decision is that "a contingent fee agreement should be enforced if reasonable." *Id.* at 1409. Mitchell correctly contends that the *Hamner* court expressly refused to adopt the rule followed in the Second and Tenth Circuits treating statutory awards as a ceiling on attorneys' compensation in civil rights cases. *Id.* Rather, the Ninth Circuit reasoned that depriving attorneys of the benefit of private fee arrangements would frustrate congressional intent to promote private enforcement of civil rights. *Id.* The court recognized that "[c]ontingent fee arrangements enable plaintiffs with meritorious claims but limited finances to obtain counsel, and they are set to account for the risk of nonrecovery." *Id.*

In reaching its decision, the Ninth Circuit noted that there may be instances when requiring plaintiff to pay the difference between a lower statutory award and a contingent fee may itself frustrate congressional intent to promote private enforcement of civil rights. *Id*, at 1409-10. In such situations the district court may exercise its equitable power "to supervise fee awards under

contingent fee arrangements to avoid unreasonable results." *Id.* at 1409. In exercising this discretion, the court may consider such factors as the level of counsel's performance and whether an award beyond the statutory amount would constitute a windfall.

Plaintiff argues that the difference between a statutory award of $75,000 and Mitchell's approximately $200,000 contingent fee constitutes a windfall, and that requiring plaintiff to pay this difference will frustrate congressional intent to provide access to counsel in civil rights cases. Plaintiff contends that because this Court determined $75,000 was a "reasonable fee" for Mitchell's work, Mitchell's compensation must be limited to that amount. According to plaintiff, there cannot be two "reasonable" fees.

The $75,000 figure was arrived at by multiplying a reasonable hourly rate by the number of hours Mitchell expended. This "lodestar" figure was then increased by a factor of two to reflect Mitchell's competent performance. However, a "reasonable" contingent fee does more than compensate an attorney for the time reasonably expended on a case. As the Ninth Circuit expressly recognized, contingent fee arrangements allow fee-indigent clients to obtain counsel to prosecute their civil rights claims while compensating the attorney for the risk of possible nonrecovery. This Court finds that Mitchell's contingent fee does not constitute a windfall.

Plaintiff next argues that the Court should void the contingent fee agreement under a California statute providing that "a law established for a public reason cannot be contravened by a private agreement." Cal. Civ. Code § 3513. Plaintiff argues that a provision in the contract giving Mitchell "the right to apply for and collect any attorney fee award made by the court" violates the rule that section 1988 attorney fees must be awarded to plaintiff, not to counsel. *See Evans v. Jeff D.*, 106 S.Ct. 1531, 1538-40 (1986); *Willard v. City of Los Angeles*, 803 F.2d 526 (9th Cir. 1986).

Plaintiff's contention is without merit. This Court expressly awarded section 1988 fees to plaintiff in its Memorandum of

Decision and Order of August 15, 1986. Moreover, the contingent fee contract expressly provides that any award of attorneys' fees must be offset against Mitchell's contingent fee. Plaintiff's rights under section 1988 have not been affected in any way by the contingent fee contract.

Plaintiff finally argues that this Court should reduce or eliminate Mitchell's contingent fee because Mitchell refused to prosecute the appeals unless plaintiff agreed to give him another ten percent of the recovery. Plaintiff claims he believed that the original contingency agreement obligated Mitchell to prosecute the action until all appeals were exhausted.

The contract, however, clearly provides that it

> covers one trial only. In the event there is a mistrial or an appeal, the parties may mutually agree upon terms and conditions of [Mitchell's] employment, but are not obligated to do so.

Plaintiff does not claim that he did not read the agreement before signing it. When the appeals were taken, Mitchell provided plaintiff with a written proposal, insisting that it be reviewed by independent counsel. Plaintiff took the proposal to independent counsel and then decided to retain other counsel for the appeals. The Court finds that both Mitchell and plaintiff acted within their rights.

The Court finds no reason to reduce or eliminate Mitchell's rights under the contingent fee agreement.

CONCLUSION

The appeals of the judgment-in-chief and the statutory award do not deprive this Court of subject matter jurisdiction to consider the parties' rights under the contingent fee contract. However, Mitchell is not entitled to intervene in this action under either Fed.R.Civ.P. 24(a)(2) or 24(b)(2).

This Court has jurisdiction to determine the rights of the parties under the contingent retainer agreement as ancillary to its

conduct of the principal litigation. The Court declines to exercise its discretion to do so, however. Mitchell can adequately protect his rights under California law when plaintiff's recovery in this action has been finally determined and all appeals exhausted. Mitchell's filing of this motion is deemed to give notice to all parties in this action of Mitchell's claim for an equitable lien on the judgment.

The Court finds no persuasive reason to exercise its discretion under *Hamner v. Rios*, 769 F.2d 1404 (9th Cir. 1985) to reduce or eliminate Mitchell's rights under the contingent fee agreement.

THEREFORE, IT IS HEREBY ORDERED THAT Mitchell's motion to intervene to confirm a lien is DENIED.

The Clerk shall send, by United States mail, a copy of this Memorandum of Decision and Order to counsel for the parties.

DATED: January 22, 1987.

ROBERT J. KELLEHER
Senior District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JUAN FRANCISCO VENEGAS,	)	
	)	No. CV 77-4047-RJK
Plaintiff,	)	
	)	
v.	)	O R D E R
	)	
RONNIE J. SKAGGS, CARTHEL S. ROBERSON,	)	
	)	
Defendants.	)	

IT IS HEREBY ORDERED that the Court's Memorandum of Decision and Order filed January 23, 1987 is corrected to read as follows:

page 14, line 11, "approximately $200,000" is changed to read "approximately $416,00."

The Court shall send, by United States mial, a copy of this Order to counsel for the parties.

DATED: February 9, 1987

ROBERT J. KELLEHER
Senior District Judge

CIVIL RIGHTS ATTORNEYS FEE AWARDS ACT
(42 U.S.C. § 1988)

§ 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(R.S. § 722; Oct. 19, 1976, P. L. 94-559, § 2, 90 Stat. 2641; Oct. 21, 1980, P. L. 96-481, Title II, § 205(c), 94 Stat. 2330.)

Supreme Court, U.S.
FILED
JUN 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1725

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JUAN FRANCISCO VENEGAS,
Petitioner,
vs.
MICHAEL R. MITCHELL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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in propria persona

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in propria persona

QUESTIONS PRESENTED

Should an attorney in a successful civil rights case be allowed to collect a contingent fee, where the amount of the fee and the terms of the fee contract have been found by the trier of fact to be both reasonable and permissible by governing ethical standards?

Did Congress, in enacting the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. Section 1988, ("the Act") intend to add recovery of statutory fees to the already existing system of contingent fee agreements without preempting state law and without abrogating enforceable written contracts?

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No. 88-1725

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988

JUAN FRANCISCO VENEGAS,
Petitioner,
vs.
MICHAEL R. MITCHELL,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The respondent, Michael R. Mitchell ("Mitchell"), respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the Ninth Circuit in this case. The decision is reported at 867 F.2d 527 (9th Cir. 1989).

This case involves little more than the complaints of a disgruntled client who voluntarily entered into a standard contingency fee contract. There is no true conflict among the circuits on this question. Contingency fee contracts are extensively regulated by state and local bar associations and state contract law, and enforcement of a private fee agreement is consistent with prior Supreme Court decisions.

Attorney Mitchell successfully represented Venegas in his Section 1983 action against Long Beach, California police officers who used perjured evidence to convict Venegas of murder. Venegas spent two and one half years in prison for the conviction.

Three months prior to a scheduled trial date, Mr. Venegas' previous attorney (his third attorney in the case) advised Mr. Venegas that he would no longer represent him and to find another lawyer.

Against this backdrop, Mr. Venegas signed a written fee agreement, under which attorney Mitchell would be paid, if successful, 40% of any amount recovered, less a $10,000 retainer. The agreement is reproduced at Appendix A hereto. The agreement required Mitchell to apply for statutory fees and to offset any such recovery against his 40% contingent share. The agreement also expressly covered only legal services rendered by Mitchell through trial, leaving it to the parties' mutual agreement whether to continue the attorney-client relationship in the event of a mistrial or an appeal. In the event the case was lost, Mitchell was to receive no further fee at all.

Thereafter, Venegas consented to Mitchell's association of co-counsel, with attorney fees to be divided on a 50-50 basis.

After a jury trial, Mitchell obtained a $2.12 million verdict for Venegas. Pursuant to the fee agreement, Mitchell then made a Section 1988 motion for attorney's fees, and his client was awarded $117,000, of which $75,000 was for Mr. Mitchell's services. However, under the privately-negotiated fee contract, Mitchell was entitled to the contingent fee, minus the $10,000 retainer fee. An appeal was taken by defendants, but Venegas declined Mr. Mitchell's offer to represent him for an additional 10 percent of the recovery and substituted in other counsel. The Ninth Circuit affirmed the jury

verdict and court awarded attorney's fees. *Venegas v. Skaggs*, 831 F.2d 1514 (9th Cir.1987).

This Petition arises from Mitchell's motion to intervene for the purpose of confirming a lien for fees owed under the contingent fee agreement. Venegas opposed the motion, claiming Mitchell was entitled only to the statutory fee. In deciding the motion, the district court reviewed the fee contract. Although the court denied Mitchell's motion to intervene, it declined to invalidate the contingent fee agreement and left any remaining dispute to be resolved in a contract action in state court. In its decision, however, the district court specifically found that the contract was reasonable, did not result in a "windfall" to which Mitchell was not entitled, and was permissible under governing ethical standards, which in this case included the Rules of Professional Conduct of the State Bar of California. The district court also noted Mitchell's "exceptionally competent performance" in the trial.

Both Mitchell and Venegas appealed the district court's order regarding the status of the contingent fee agreement. On January 31, 1989, the Ninth Circuit reversed the district court's denial of Mitchell's motion to intervene and affirmed the district court's ruling that Mitchell's entitlement to attorney's fees was not limited to the Section 1988 award and that the 40% contingent fee was reasonable. The case was remanded to the district court with the strong suggestion that it exercise its ancillary jurisdiction to determine fees.

In the meantime, the underlying case has been settled with the City of Long Beach paying in excess of $2 million, and with Venegas refusing to pay Mitchell any fee whatsoever, statutory or otherwise.

Mitchell seeks only that to which he is entitled by legal contract as reviewed by the courts: attorney's fees

for successfully representing a client who now refuses to honor his financial obligations.

REASONS WHY THE PETITION SHOULD BE DENIED

I

THE CASE IS NOT RIPE FOR REVIEW BECAUSE THE JUDGMENT BELOW WAS INTERLOCUTORY

This case is not ripe for review because the judgment below is interlocutory. The Ninth Circuit remanded the matter to the district court. No inconvenience or embarrassment to any party would result from the denial of certiorari at this point, so this Court should not issue its writ. *American Construction Co. v. Jacksonville, T. & K. W. Ry.*, 148 U.S. 372, 384, 13 S.Ct. 758, 763 (1893). Each party will have an opportunity to seek appropriate review after final judgment.

II

THERE IS NO TRUE CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL ON THIS ISSUE

The purported intercircuit conflict on the issue of contingent fee agreements is illusory.

Petitioner relies heavily on the Tenth Circuit's opinion in *Cooper v. Singer*, 719 F.2d 1496 (10th Cir. 1983). However, the *Cooper* decision was founded on the assumption that statutory fees belonged to and would be awarded to the attorney. As shown *infra*, p. 17, *Evans v. Jeff D.*, 475 U.S. 717, 89 L.Ed.2d 747, 106 S.Ct.

1531 (1986) has shown that assumption to have been erroneous.

First, the Tenth Circuit itself has subsequently limited the *Cooper* decision. *See Sears v. Atchison, Topeka & Santa Fe Railway Co.*, 779 F.2d 1450 (10th Cir. 1985). In *Sears*, plaintiffs' counsel had a retainer agreement that provided counsel would recover 40% of all monetary recovery. After two appeals and two denials of certiorari, judgment of $4.1 million for plaintiffs was affirmed. Plaintiffs then petitioned for relief from their fee contract obligations, relying on *Cooper*. The Tenth Circuit refused to apply *Cooper* retroactively to govern a contract made before the *Cooper* decision, noted that *Cooper* has been criticized by other courts, and stated that the *Sears* fee agreement was enforceable because the contract language differed from the contract at issue in *Cooper*. The Tenth Circuit in *Sears* rejected the argument that the 40% retainer resulted in a windfall to plaintiffs' counsel, noting that the fee agreements were "freely, willingly and knowingly entered into prior to the litigation."

Second, petitioner's attempt to create a conflict where none exists is nowhere more clear than in his citation to *Pharr v. Housing Authority*, 704 F.2d 1216 (11th Cir. 1983). Petitioner implies that *Pharr* is still good authority and that this decision adds "to the confusion in the Circuits." Cert. Petition at p. 8. However, *Pharr* has been overruled by *Blanchard v. Bergeron*, ___ U.S. ___, 109 S.Ct. 939 (1989). In *Pharr*, the Eleventh Circuit found that if a contingent fee agreement was reasonable, then the *defendant* was liable for the greater of the statutory fee or the contingent fee amount. This holding is contrary to this Court's recent decision in *Blanchard*, where the Court plainly stated that "[t]he defendant is not, however, required to pay the amount called for in a contingent fee contract if it is more than a reasonable fee

calculated in the usual way." 109 S.Ct. at 944. Both courts below found Mitchell's fee was reasonable.

Third, neither *Sullivan v. Crown Paper Board Co., Inc.*, 719 F.2d 667 (3rd Cir. 1983) nor *Wheatly v. Ford*, 679 F.2d 1037 (2d Cir. 1982) establish a true Circuit Court conflict. Both cases merely state that plaintiff should pay his or her attorney either the statutory fee or the contingent fee, whichever is greater. *Sullivan*, 719 F.2d 670. Petitioner mischaracterizes the language in *Wheatley*, which only provides — consistent with all other Circuits — that statutory fee should be applied as a credit to the contingent fee, if the contingent fee is greater. *See Wheatley*, 679 F.2d a: 1041 ("Counsel is entitled by the terms of [the fee] contract to 40% of the final recovery. . . . [W]e hold that, *to the extent* counsel receives payment of the section 1988 statutory award, his claim for services rendered under his fee agreement with his client shall be deemed paid and satisfied.") (emphasis added). *Wheatley* simply holds, in using the word "to the extent" rather than the word "if," that no double recovery of fees is allowed.

All of the cases cited by petitioner — with the sole exception of the Ninth Circuit's decision herein — were decided before this Court's opinions in *Blanchard v. Bergeron*, __U.S.__, 109 S.Ct. 939 (1989), *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 107 S.Ct. 3078 (1987) ("*Delaware Valley II*"), *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 107 S.Ct. 2494 (1987), and *Evans v. Jeff D.* 475 U.S. 717, 89 L.Ed.2d 747, 106 S.Ct. 1531 (1986). As discussed below, each of these decisions supports the enforceability of the private contractual agreement between attorney and client in the context of statutory fee cases.

In summary, the cases on which petitioner relies have lost their authority by reason of intervening decisions of the Supreme Court.

III

ENFORCEMENT OF RESPONDENT'S FEE AGREEMENT IS CONSISTENT WITH SUPREME COURT DECISIONS

In each of three recent decisions addressing issues arising under fee-shifting statutes, this Court has acknowledged the viability of fee agreements privately negotiated by plaintiffs and their attorneys. In *Crawford Fitting*, the right to privately contract for fees was preserved. In that case, the Court limited reimbursement to a prevailing party for expert witnesses to $30.00 per day. Accordingly, a federal court is bound by the limits of 28 U.S.C. §§ 1821 and 1920 "absent explicit statutory or contractual authority to the contrary." *Id.* at 390, 393.

Likewise, in *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 107 S.Ct. 3078 (1987), the Court stated that "the fee contract between the client and his attorney should be taken into account when determining the reasonableness of the award. . . ." *Delaware Valley, supra* at 3085. *See, also, Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N. D. CA 1974), *aff'd.* 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounas*, 436 U.S. 547 (1978). In its discussion of the nature of Section 1988, the Court in *Delaware Valley* also noted that because a losing plaintiff is entitled to no fees, his or her attorney will be paid nothing unless "the attorney has an agreement with the client that the attorney will be paid, win or lose." *Id.* at 3081.

In *Blanchard v. Bergeron*, __ U.S. __, 109 S.Ct. 939 (1989) this Court again reaffirmed the viability of private contingent fee agreements by holding that a district court cannot limit the court-awarded attorney's fees to an amount provided in a contingency fee

agreement between a prevailing party and his or her attorney. Thus, "a contingent fee agreement is not a ceiling upon the fees recoverable under Section 1988," *Id.* at 946, and a private agreement may be a factor in determining the reasonableness of court-awarded fees. *Id.* at 944. However, *Blanchard* also makes it clear that a prevailing party and his or her attorney can contractually agree to a higher fee than the statutory award, and that will not alter the losing party's obligation to pay court-awarded fees. *Id.* at 945. Thus, petitioner's appeal at page 13 of his brief to "balance the scales" by invalidating all contingency fee agreements is empty rhetoric. *Blanchard* has, in fact, already equalized the equation. Defendants in civil rights cases are only liable for the amount of the statutory fee award, no more no less, regardless of the private contract between client and attorney.

Moreover, petitioner has taken out of context and misconstrued one sentence of this Court's dictum in an effort to transform *Blanchard* into a case upholding the right of a disgruntled client to breach a private contractual agreement with his or her attorney. Petition, p. 11. Despite petitioner's attempt, *Blanchard* remains a case concerned primarily with the fee obligations imposed by a court on a losing party by virtue of Section 1988.

Finally, although this Court did not directly address the issue of contingent fee agreements in *Evans v. Jeff D.*, 475 U.S. 717, 89 L.Ed.2d 747, 106 S.Ct. 1531 (1986), implicit in its determination was an acknowledgment of the validity of private fee agreements. In *Jeff D.*, this Court held that Section 1988 does not require a district court to disapprove a stipulation seeking to settle a case which is expressly conditioned on the prevailing party's waiver of attorney's fees. Reviewing Congressional intent, the Court observed, "[Congress] did not prevent the party from waiving this eligibility

[for attorney's fees] anymore than it legislated against assignment of this right to an attorney. . . ." *Id.* at 730-31. The Court added that while "Congress expected fee-shifting to attract competent counsel to represent citizens deprived of their civil rights, it neither bestowed fee awards upon attorneys nor rendered them *nonwaivable or non-negotiable*." (emphasis added) 475 U.S. at 731-32. As such, if the right to apply for or collect statutory fees can be used by the *client* as "a bargaining chip" to be waived to negotiate an advantageous settlement, then it would be an anomalous result to prevent a prevailing attorney from seeking to enforce a private fee agreement — whether hourly, contingent or otherwise. Surely, if a fee contract is viable after a *Jeff D.* waiver of fees, it must be equally enforceable after a successful trial on the merits which occurred here. *See, Venegas v. Mitchell*, petitioner's Appendix, p. A-15.

IV

THE LEGISLATIVE HISTORY OF THE ACT SHOULD NOT BE CONSIDERED, BUT EVEN IF IT IS CONSIDERED, IT DOES NOT SUPPORT PETITIONER'S CONSTRUCTION OF THE LAW

Petitioner has postulated that the legislative history of the Act supports petitioner's interpretation of the holdings in *Cooper* and *Wheatley*. To the contrary, the clear language of the statute, as well as its legislative history, belie this view.

It is a fundamental rule of statutory construction that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to

enforce it according to its terms." *Caminetti v. U.S.*, 242 U.S. 470 (1917). If the language is unambiguous, it is inappropriate to resort to legislative history to interpret the statute. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

Just weeks before the Act was enacted, Congress passed the Antitrust Civil Process Act amendments of 1976. During the debates on that legislation, Congress focused considerable attention on the availability of contingency fees for private attorneys. Both the House and Senate ultimately agreed expressly to prohibit private attorneys from collecting contingency fees based on a percentage of monetary relief unless the award of fees is determined by a court. *See*, 15 U.S.C. Section 15g(1)(A) and (B).

In contrast to the contingent fee prohibition in the antitrust amendments, Congress included no limitation on private fee contracts in Section 1988. In *Crawford Fitting Co. v. J.T. Gibbons*, Inc., 482 U.S. 437, 96 L.Ed.2d 385, 391, 107 S.Ct. 2494 (1987), the Court held that Congress had enacted 28 U.S.C. Section 1821 as a limitation on the amount of reimbursement a district court may award to a prevailing party for expert witness fees. Thus, Justice Rehnquist aptly observed, "[i]t is . . . clear that when Congress meant to set a limit on fees, it knew how to do so." Likewise, Congress unquestionably knew how to place limits on the availability of fees under a private contingency fee contract, but it did not do so when it passed the Civil Rights Attorney's Fees Awards Act. Petitioner cannot now impute such limitation in the absence of an expression of clear Congressional intent.

Even if reference is made to the legislative history of Section 1988, it readily demonstrates that the primary purpose of the Fees Act was "the promotion of respect for civil rights" rather than the imposition of limits on

attorney's fees, as petitioner suggests. *See, e.g.*, S. Rep. No. 94-1011, p. 5 (1976); *Evans v. Jeff D.*, 475 U.S. 717, 731-32, 89 L.Ed.2d 747, 106 S.Ct. 1531 (1986). According to the chief proponents of the legislation, the impetus for enacting the Fees Act was to restore the status quo after the Supreme Court decided in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) that attorney's fees could not be awarded under the Reconstruction Civil Rights Acts in the absence of a specific authorizing statute. *See, e.g.*, Senate Report No. 94-1011, pp. 1, 4, 5; House Report No. 94-1558, pp. 2, 3, 9. The scant commentary cited by petitioner as criticism of attorneys seeking fees for their work pales in comparison to the strong emphasis Congress placed on encouraging meritorious civil rights actions. It is surely not enough to overcome the extensive other legislative history and statutory language to the contrary.

V

CONGRESS NEVER INTENDED TO PREEMPT EXTENSIVE STATE LAW ESTABLISHING THE VALIDITY AND GOVERNING THE REASONABLENESS OF CONTINGENT FEE CONTRACTS

In support of petitioner's argument regarding Congressional intent, he cites the Senate Judiciary Committee Report for the proposition that "citizens must have the opportunity to recover what it costs them to vindicate [their civil rights] in court." (Petition, p. 8.)

This sentence in the Report is founded on the mistaken assumption that most, if not all, civil rights clients are able to and do pay their lawyers on an hourly basis as the case proceeds. If civil rights clients were able to

do this, they would have no difficulty finding lawyers financially able to represent them. The true facts are that civil rights clients are generally not able to pay an hourly attorney fee or are not able to attract an attorney able to represent them on a contingency basis because of the relatively minor damages or equitable relief sought.

Petitioner also cites remarks of Senator Tunney. (Petition, p. 9.) However, Congress knew, as Senator Tunney must have known, that nonlawyers cannot normally act as "private attorney's general." In civil rights cases, lawyers, not nonlawyers, enforce the law. Lawyers in the Civil Rights Division of the U.S. Department of Justice, pursuant to guaranteed government salaries (with no obligation to pay overhead) enforce the civil rights laws. No one expects these government lawyers "to pay for the privilege of enforcing the law." Nor should anyone expect private lawyers such as respondent to pay for the privilege of enforcing the law. And the burden is truly on private lawyers, not their clients, to bear the substantial overhead of operating a law office while they seek to vindicate the public right, and when, unlike government lawyers, they receive no payment if they fail to succeed.

Thus, it is clearly a questionable exercise to rely upon a single sentence in one branch of Congress' report, and the remarks of one Senator to ascertain Congressional intent in enacting a statute. *See, e.g., Blanchard v. Bergeron*, __ S.Ct. __, __ L.Ed.2d __, __ U.S. __(1989) (Concurrence of Justice Scalia).

VI

RESOLUTION OF THE FEE CONTRACT ISSUES RAISED BY PETITIONER REQUIRES FACT SPECIFIC ANALYSIS THAT WILL FREQUENTLY INVOLVE CASES WITH BOTH STATE LAW AND FEDERAL CIVIL RIGHTS CLAIMS

The issues raised by petitioner involve fact specific matters of contract interpretation and ethical principles that are best left to the extensive enforcement mechanisms already in place among local, state and national bar associations, state regulatory provisions, and fee arbitration panels which routinely regulate attorney-client fee disputes. Petitioner claims that two of the issues presented herein involve: (1) the attorney's fiduciary duty to the client regarding disclosure of fee provisions; and (2) whether a federal court can enforce a contingent fee contract contrary to public policy as stated by the state court.

These arguments were either not presented to the Ninth Circuit, or were not clearly enough presented to merit mention in the Ninth Circuit's opinion, and the facts of record will not support a determination of these questions by this Court. They await evidentiary determination on remand.

Second, even if petitioner had adequately presented these arguments on appeal, neither supports petitioner's request for certiorari. The issue regarding fiduciary obligations is not briefed by petitioner and the petition is devoid of any suggestion that there is a Circuit Court conflict on this issue. The last question which petitioner identifies regarding enforcement of a contingent fee agreement that is purportedly "contrary to the public

policy as expressed by the highest court in the state in which the court sits," Petition at i, is a nonissue. Petitioner cites no authority for this proposition, and the only California cases cited have no application to the facts of this case. Instead, petitioner's California cases address the availability of quantum merit recovery for the attorney who is discharged prior to the contingency — a situation not at issue here, because Mitchell represented Venegas until the contingency in the agreement was satisfied, to wit, he prevailed at the trial.

However, petitioner is correct in noting that state law will frequently need to be referenced in civil rights fee contract cases. For example, in *City of Riverside v. Rivera*, 477 U.S. 561 (1986), plaintiffs prevailed on both their federal claims and their state law negligence claims. *Id.* at 564. Had plaintiffs' counsel wished to enforce a fee contract in that case, the Tenth Amendment would require that the fee contract based on the state law tort causes of action be governed and enforced in accordance with state law. The same would be true with discrimination cases in California, where the state legislature has enacted state statutes prohibiting discrimination in employment, housing and public accommodations and services. *See* Cal. Govt. Code, Section 12940, *et. seq.*; Cal. Civil Code, Section 51. Other pendent state claims are often included in federal civil rights cases in California, including intentional infliction of emotional distress predicated on a discrimination theory. *See, e.g., Agarwal v. Johnson*, 25 Cal.3d 932 (1979) (intentional infliction of emotional distress based on racial epithets); *Alcorn v. Anbro Engineering, Inc.*, 2 Cal.3d 493 (1970) (supervisor shouting epithets to plaintiff). In these cases involving both federal and state discrimination causes of action, the California courts would have the right to determine and regulate the attorney's fees contract questions in accordance with local and state bar professional rules of responsibility,

California contract law, and the fee contract provisions of the California Business & Professions Code.

As petitioner's reference to state law indicates, the predominate interest of the states in regulating fee contracts supports denial of the petition for certiorari.

VII

CONGRESS DID NOT PREEMPT STATE AND LOCAL AUTHORITY

> "It is well established that within constitutional limits Congress may preempt state authority by so stating in express terms. (citation omitted) Absent explicit preemptive language, Congress' intent to supersede state law altogether may be found from a 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for States to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.' (citations omitted) Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,'

> (citation omitted), or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' (citation omitted)" *Pacific Gas & Electric Company v. State Energy Resources Comm'n* (1983) 461 U.S. 190, 203-204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752.

First, Congress never inserted any express terms in amending Section 1988 preempting state laws validating or regulating contingent fee agreements.

Second, the scheme of Section 1988 is not so pervasive as to make reasonable the inference that Congress left no room for states to allow their inhabitants and members of their bars the historic right to enter into and enforce contingent fee agreements in federal civil rights actions. The Civil Rights Attorney's Fees Awards Act does not touch a field in which the federal interest is so dominant — the validity and reasonableness of contingent fee agreements — that the federal system will be assumed to preclude enforcement of state laws on that subject. The Act validates fee-shifting for prevailing plaintiffs in an effort to assure they obtain competent counsel. Precluding enforcement of state laws on contingent fees does nothing to assure, and in fact undermines, the ability of fee-indigent clients to obtain counsel.

The object sought to be obtained by the federal law (that victims of civil rights violations with only equitable or small monetary claims obtain competent counsel) and the character of obligations imposed by it (that fee-shifting occur when the victim prevails) reveals that the state laws respecting contingent fee agreements have a different purpose: to assure that all fee-indigent persons who have civil rights or other claims of potentially substantial monetary value are able to obtain an attorney.

Third, the state law here does not conflict with federal law as interpreted by *Evans*. State law enshrines the right of an attorney and client, free of coercion, to contract that the client will pay the attorney a percentage only out of the *res* recovered. Federal law provides that the client will be paid (upon prevailing) — or may waive to achieve settlement — by the offending defendant a reasonable amount, denoted an "attorney's fee" to achieve the *Evans* goal of settling cases, or, if the fee is actually extracted from the defendant, to motivate the defendant to stop violating civil rights. It is not physically impossible for the attorneys and the parties to comply with both state law respecting contingent fees and the federal fee statute. Nor do the state contingent fee laws stand as any obstacle to enforcement of Section 1988. Indeed, the state laws harmoniously supplement Section 1988 insofar as they provide at least some means of payment for attorneys in the face of burgeoning client fee waivers.

Respondent Mitchell has suffered these fee waivers on numerous occasions. *See, e.g. Mitchell v. Los Angeles*, 753 F.2d 86 (9th Cir. 1985); *Willard/Mitchell v. Los Angeles*, 803 F.2d 526 (9th Cir. 1986). ("[In *Evans*] the Supreme Court held that Section 1988 vests the right to 'attorney's fees' in the 'prevailing party' rather than his attorney. *Id.* 106 S.Ct. at 1538-40, n. 19. It follows that an attorney has no standing under Section 1988 to seek attorney's fees on his own behalf." 803 F.2d at 527.)

It is inconceivable that Congress would have intended to make the district court's orders respecting Section 1988 fees preemptive of state, local, and federal bar regulation of contingent fee agreements. This would place intolerable burdens on attorneys.

For example, the U.S. District Court for the Central District of California has adopted the Rules of Professional Conduct of the State Bar of California as the standard of professional conduct for the district court. Local Rule 2.5.1. Cal. Rule of Professional Conduct 4-200 prohibits attorneys from entering into "an agreement for ... an ... unconscionable fee," and recites eleven factors to be considered in determining the conscionability of a fee, including whether "the fee is fixed or contingent." Thus, an attorney might properly contract for a reasonable contingent fee under state law, adopted by the local federal court, only to have the fee declared unconscionable or unreasonable by a different federal standard, subjecting the attorney to state bar and local federal bar discipline.

In sum, there is no evidence that Congress intended Section 1988 to be the exclusive vehicle for payment of civil rights attorneys. If that had been intended, the statute would say so and it does not.

CONCLUSION

This case involves a private contract made and performed in California. The client received precisely what he bargained for at arms length: the professional services of a skilled, experienced trial lawyer. In fact, Mitchell performed a superior job — resulting in a substantial verdict for the client. Since there is no true conflict in the circuits on any of the issues raised by petitioner, this case simply involves a disgruntled client seeking to avoid the terms of a properly enforceable contract to which he voluntarily agreed. Nowhere does it appear that Congress intended to preempt the ability of parties to contract. This is a simple breach of contract case, and the district court has not rendered any

judgment for either party on the contested issues. None of petitioner's arguments warrants issuance of a writ of certiorari.

DATED: June 23, 1989.

Respectfully submitted,

MICHAEL R. MITCHELL
in propria persona

APPENDIX A

CONTINGENT RETAINER AGREEMENT

This Agreement is made at the County of Los Angeles, State of California, effective on September 18, 1985 by and between Juan Francisco Venegas, [home address and phone number omitted] Work: Menes Law Corporation, 1901 Avenue of the Stars, Suite 1240, Century City, CA 90067, Phone (213) 277-4895 ("Client") and MICHAEL R. MITCHELL, 5850 Canoga Avenue, 4th floor, Woodland Hills, CA 91367, Phone (818) 992-1203 ("Attorney") hereinafter sometimes referred to jointly as "the parties."

In consideration for the mutual promises hereinafter set forth the parties agree as follows:

1. Client agrees to retain Attorney to represent Client as Client's Attorney in that certain pending federal civil rights action by Client as plaintiff and Long Beach, California police officers as defendants ("Defendants") in connection with the Client's December 25, 1971 false arrest, trial, conviction and imprisonment for 2 1/2 years in state prison.

2. Attorney agrees to prosecute the lawsuit, now scheduled for trial November 5, 1985, on Client's behalf against Defendants. Client agrees that Attorney is empowered to perform legal services for Client on Client's behalf in said lawsuit and to do all things necessary, appropriate or advisable in connection with Attorney's representation. Client agrees that Attorney is empowered to effect a compromise or settlement in the above-mentioned matter subject to Client's prior authorization. This agreement covers one trial only. In the event there is a mistrial or an appeal, the parties may mutually agree upon terms and conditions of Attorney's employment, but are not obligated to do so.

3. Client hereby expressly authorizes Attorney to allow any accountant employed by Attorney and any

accountant or other person representing the California State Bar and any federal or state taxing authority to inspect and copy records of accounts of Client's funds held in trust by Attorney.

4. Client agrees to pay Attorney a non-refundable retainer fee in the amount of Ten Thousand Dollars ($10,000), payable $5,000 upon execution of this agreement and $5,000 prior to November 5, 1985. Client also agrees to pay Attorney for legal services rendered in connection with the lawsuit, Forty Percent (40%) of the gross amount recovered (prior to any deductions for costs) less the non-refundable retainer fee actually paid. Client understands that Attorney's fee is not set by law but is negotiable between Client and Attorney. Client warrants and represents that Client will hold Attorney harmless from all liens or other claims by any person to all proceeds recovered.

Client initials /s/ J.V.
Attorney initials /s/ MRM

5. Client understands and agrees to pay and advance all necessary costs and expenses incident to the performance of this agreement. It is anticipated that these costs may include, but are not limited to the following: filing fees, service of process fees, trial witness fees, deposition costs, expert witness fees, computerized legal research, travel, and copying costs. Client and Attorney agree that the contingent fee payable to Attorney shall be calculated based on the gross amount recovered prior to any deduction for costs or expenses incurred or advanced.

6. Client hereby gives and grants unto Attorney the right to endorse a check, draft or other instrument for the payment of money in Client's name or on Client's behalf and to retain the share and sums out of the amounts finally received by settlement, judgment or otherwise, in

full for the attorneys fee due to Attorney under this agreement and for any disbursements made by the Attorney for costs and expenses, delivering the balance to Client.

7. Client agrees to cooperate fully with Attorney in all matters relating to Attorney's representation and agrees that failure to cooperate will constitute a breach of this Agreement by Client.

8. Client agrees that Attorney may, at Attorney's election, and at any time, intervene as a party in the action for the sole purpose of protecting Attorney's interest in and to any attorney fee award which may be made by the trial or any appellate court. Client acknowledges that the right to apply for and collect any attorney fee award made by a court is Attorney's and not Client's right. Client understands and agrees that Client has no right to nor shall client attempt to waive or waive Attorney's right to apply for and collect attorney's fees. In consideration for Client's agreements, Attorney agrees that Attorney shall make appropriate applications for attorneys fees in the lawsuit. Attorney and Client agree that to the extent that attorneys fees are awarded and recovered by Attorney, the same shall, dollar-for-dollar, reduce Client's obligation to pay (or shall be refunded to Client if previously paid) attorney fees to Attorney pursuant to Paragraph 4 above. Any attorneys fees awarded by a court in excess of the amount which Client is obligated to pay pursuant to paragraph 4 above is the property of and shall be paid to Attorney.

9. This agreement is binding on the successors, heirs, administrators, executors and trustees of the parties.

Client initials /s/ J.V.
Attorney initials /s/ MRM

10. Client acknowledges that Attorney has advised Client and that Client understands that, should Client not prevail in the lawsuit, Client would be required to pay Defendants' costs of suit, and might possibly be required to pay Defendants' attorney's fees. This agreement is the entire agreement between the parties, and this agreement may not be amended or modified except by a written document signed by both parities. [*sic*] Should any dispute arise respecting rights or obligations under this agreement, the prevailing party shall be entitled to a reasonable attorney's fee.

11. This Agreement shall become effective and binding only upon acceptance by Attorney. Acceptance can only be made by Attorney's affixing his signature below and delivering an original signed copy to Client. Client understands and agrees that Attorney has made no guarantees regarding the successful termination of this matter and that all expressions relative to the outcome are matter of Attorney's opinion only.

DATE: 9-18-85 /s/ Juan F. Venegas
Juan Francisco Venegas ("Client")

DATE: 9-18-85 /s/ Michael R. Mitchell
Michael R. Mitchell ("Attorney")

January 8, 1986

I, Juan Venegas, consent that the Law Offices of Johnnie L. Cochran, Jr associate as my attorney with Michael R. Mitchell in my federal case of *Venegas v. Wagner*, and that said attorneys may share attorney fees on a 50-50 basis.

/s/ Juan F. Venegas

No. 88-1725

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JUAN FRANCISCO VENEGAS,
Petitioner,

vs.

MICHAEL R. MITCHELL,
Respondent.

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

DONALD A. JOHNSON, being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the above action. My business address is 3550 Wilshire Boulevard, Suite 916, Los Angeles, California 90010. On June 23, 1989, I served the within BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California, in sealed envelopes addressed as follows:

MICHAEL S. BROMBERG, ESQ.
BOX 2112, HAMPTON STREET
SAG HARBOR, NY 11963

That affiant makes this service, for MICHAEL R. MITCHELL, *in propria persona*, and that to the best of my knowledge all the persons required to be served in said action have been served.

DONALD A. JOHNSON

On June 23, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared DONALD A. JOHNSON known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Witness my hand and official seal.

OFFICIAL SEAL
Theodore Matsuo Wilden
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
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(3)

No. 88-1725

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JUAN FRANCISCO VENEGAS,

Petitioner,

VS.

MICHAEL R. MITCHELL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Respondent (Mr. Mitchell) raises three issues for the first time which this reply will address. They are the first three sections of the reasons the writ should be denied. The other four alleged reasons are unsound arguments but aimed at the merits of the case. It is inappropriate to address the merits at this time.

I. THE CASE IS RIPE FOR REVIEW

The Court of Appeals had before it the appeal of Mr. Mitchell that his motion to intervene to confirm a lien should have been granted and the appeal of Mr. Venegas from the refusal of the district court to reduce the fee claimed by Mr. Mitchell to the amount the court had previously determined to be the reasonable fee pursuant to §1988.

The part that was remanded to the district court, the motion to intervene to confirm a lien, is now moot. On April 13, 1989, Mr. Mitchell served a "Motion To Determine Attorney's Fees" calendared for May 15, 1989. In that motion Mr. Mitchell told the district court "This Court Has Jurisdiction. The mandate of the court of appeals issues '7 days after the entry of the order denying the petition . . .' F.R.A.P. 41(a) The order denying the petition was entered April 4, 1989. Thus the mandate issued April 11, 1989." In the next two sections of the motion respondent stated "The Court of Appeals remanded for this court to 'determine the merits of Mitchell's motion to confirm a lien . . .' As shown below, events have mooted the need for this court to determine the lien claim. All that remains is for the court to exercise its ancillary jurisdiction to determine attorney fees." The next section goes into the details of the settlement of the *Venegas v Skaggs*, 831 F.2d 1514 (9th Cir. 1987) and the placing in escrow of the $800,000.00 which is the subject of this suit. Mr. Mitchell then requested an order for $839,227 (which was 40% percent of the $2,000,000.00 settlement, plus 40% of the $117,000 §1988 award made to Mr.Venegas, equalling $846,800, minus the $10,000 previously paid by Mr. Venegas, plus $2,427.00 in costs).

Mr. Mitchell was called, by counsel for petitioner, and told that not only did the mandate not issue on April 11, as Mr. Mitchell had represented to the district court, but that the Ninth Circuit had stayed the mandate over Mr. Mitchell's April 14, 1989 objection. Mr. Mitchell withdrew the motion from the court's calendar. However, that withdrawal does not change the fact that the motion to confirm a lien, which Mr. Mitchell tells this Court it should wait to have decided, is moot. Of course, Mr. Venegas' appeal to have the district court reduce the fee was not sent back to the lower court. The lower court refused to reduce Mr. Mitchell's fee to the amount it had previously determined to be reasonable pursuant to §1988 and that determination was affirmed. It is that determinati which is the subject of the Petition for the Writ of Certiorari.

II. THERE IS A TRUE CONFLICT IN THE CIRCUITS.

Mr. Mitchell for the first time denies a conflict in the circuits. In Mr. Mitchell's opening brief in the Ninth Circuit on page 10 Mr. Mitchell has a topic heading "Conflicting Case Law" the section begins:

> "The Tenth Circuit has flatly held that if the Section 1988 fee award is less than the amount owed under a contingent fee agreement, the attorney will be expected to reduce his fee to the amount awarded . . ."

(The same section appears in Mr. Mitchell's reply to Mr. Venegas' opposition to the motion to confirm a lien in the district court. Appellant's Excerpt of Record on Appeal pages 180 to 181.)

In citing *Cooper v. Singer*, 719 F.2d 1496, (10th Cir. 1983) (*en banc*), in both courts below, Mr. Mitchell noted the fact that the case was cited by this Court in *Evans v. Jeff D.*, 475 U.S.717 (1986) in footnote 19 of this Court's opinion. Now, before this Court Mr. Mitchell claims Cooper was "founded on the assumption that the statutory fees belonged to and would be awarded to the attorney" Brief in Opposition p. 4. Mr. Mitchell then claims *Evans* has shown the assumption to be erroneous. This Court cites *Cooper* in footnote 19 of *Evans* for the proposition that the §1988 fee is the client's fee. The footnote cites *Cooper* for "distinguishing between client's and counsel's entitlement to fees in the course of holding that 'if the *client's* section 1988 fee award . . . is less than the amount owed to the attorney under a contingent fee agreement, then the lawyer will be expected to reduce his fee to the amount awarded by the courts.' " (emphasis added by the Supreme Court) 475 U.S. at 730.

Mr. Mitchell next claims that there is no conflict because the Tenth Circuit refused to make *Cooper* retroactive to fee agreements entered into before *Cooper* was decided. However, the fee agreement in the case at bar was entered into after *Cooper*. So, if this case were brought in the Tenth Circuit rather than the Ninth the result would be different. "Cases are properly

regarded as conflicting if it can be said with confidence that another circuit would decide the case differently because of language in an opinion in a case having substantial factual similarity." Stern, Gressman, and Shapiro, *Supreme Court Practice*, Sixth Edition, page 374 (1986).

Mr. Mitchell misconstrues the holding in *Wheatley v. Ford*, 679 F.2d 1037 (2d Cir. 1982) to claim that there is no conflict with the Ninth Circuit's position. However, the Ninth Circuit construed *Wheatley* precisely as Mr. Venegas did. After noting the holding in cases that did not use the contingent fee agreement as a cap on the §1988 fee award, the court in *Hamner v. Rios*, 769 F.2d 1404 (9th Cir. 1985) stated:

> "In contrast, some circuits treat the amount awarded under section 1988 as the ceiling on a fee award, regardless whether recovery under the contingent agreement would be greater. According to the Second Circuit, a claim for services rendered under a contingent fee agreement must be deemed satisfied to the extent counsel receives an award under section 1988. *Wheatley v. Ford*, 679 F.2d 1037, 1041 (2d Cir.1982) * * * The Tenth Circuit recently followed *Wheatley* . . ." (citing *Cooper* as the case that followed *Wheatley*.) 769 F.2d at 1408-1409.

The Ninth Circuit went on to determine that the plaintiff should pay the difference between the reasonable fee under §1988 and the contingent fee out of his damages which is a direct rejection of both *Wheatley* and *Cooper*.

It is inexplicable how Mr. Mitchell can claim *Wheatley* and *Cooper* are not in direct conflict with the holding of the Ninth Circuit herein. The author of the opinion in the case at bar noted the conflict at oral argument in the Ninth Circuit.

The conflict is not only real, but it will not go away with ease. This Court's decision in *Blanchard v. Bergeron*, 109 S. Ct 939 (1989) has the potential to polarize the positions even further. Surely the Second and Tenth Circuits will read the reasoning

of the opinion and the language "Thus it is that a plaintiff's recovery will not be reduced by what he must pay his counsel" 109 S. Ct. at 944, as vindication for their position that Congress intended to reward the private citizen for acting as a private attorney general by allowing them to recover all that it costs to vindicate society's interests. And just as surely the circuits which, like the Ninth Circuit, believe that Congress intended to give incentive to attorneys will, as the Ninth Circuit did in the case at bar, ignore the reasoning and exalt the result that gives more money to attorneys as vindication of their attorney-incentive view of §1988.

III. THE DECISION OF THE NINTH CIRCUIT FAVORING ENFORCEMENT OF MR. MITCHELL'S FEE AGREEMENT IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.

A close analysis of *Blanchard v. Bergeron*, *supra* reveals that enforcement of Mr. Mitchell's fee agreement is not proper under federal law. That case indicates that a common law contingent fee agreement is appropriate where counsel undertakes a case not knowing whether it sounds in civil rights or common law tort. But that is not our case. By the time Mr. Mitchell got this case the common law state court causes of action had already been tried and reversed and were awaiting a new trial in state court. The case Mr. Mitchell had been asked to take had been up to the Ninth Circuit in *Venegas v. Wagner*, 704 F.2d 1144 (9th Cir. 1983) and there was no question it sounded in civil rights. Mr. Mitchell knew or should have known that he could only charge Mr. Venegas a reasonable fee. Mr. Mitchell knew or should have known that in passing the Civil Rights Attorney's Fee Award Act of 1976 Congress provided that the court would award the prevailing party a reasonable fee and order the defendant to pay that fee. Therefore, in this civil rights field, there was no justification for Mr. Mitchell having Mr. Venegas enter into a percentage fee agreement at all. As argued by Mr. Venegas in the Court of Appeals, the sole purpose of the fee agreement in this case was to secure an advantage for Mr. Mitchell at the expense of his client. Had *Blanchard* been decided before argument below it would have been cited as authority along with *Cooper* which the Ninth Circuit felt free to reject.

The decisions of this Court when read together give the view that §1988 means that if plaintiff prevails in a civil rights case, no matter what fee agreement attracted the attorney in the first instance, at the end of the day it will be the court which determines the attorney's reasonable fee.

CONCLUSION

Mr. Mitchell attempts to blind this court to the issues in this case by calling Mr. Venegas a disgruntled client. However, the federal issue, the relationship between a fee awarded under section 1988 and a larger common law contingent fee, is an issue directly effecting the attorney-client relationship in all civil rights cases seeking money damages and indirectly effecting civil rights cases seeking other relief.

Since there is a true conflict in the circuits, and the holding in the Ninth Circuit conflicts with the reasoning of this Court's precedents on so fundamentally important an issue, it is respectfully suggested that it is time for this Court to resolve the conflict so that all civil rights plaintiffs can keep all of their monetary damages in all of the circuits.

Respectfully Submitted,

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QUESTIONS PRESENTED

1. Whether a plaintiff who is awarded reasonable attorney's fees under the 1976 Civil Rights Attorney's Fee Awards Act, 42 U.S.C. § 1988, can, by virtue of a contingent fee agreement, be required to pay his attorney amounts in excess of the awarded fees.

2. Whether a plaintiff who is awarded reasonable attorney's fees under 42 U.S.C. § 1988 can, by virtue of a contingent fee agreement, be required to pay his attorney amounts grossly in excess of the awarded fees when the attorney withdrew from the case prior to the appeal and the attorney did not fully advise the plaintiff of his rights under 42 U.S.C. § 1988.

3. Whether a federal court in a civil rights case can uphold the reasonableness of a contingent fee agreement between the plaintiff and his attorney when that agreement would not be enforceable under state law.

LIST OF PARTIES NOT OTHERWISE NOTED IN THE TITLE

Parties defendant in the lawsuit at the time of the motion to intervene by Respondent were Ronnie J. Skaggs and Carthel S. Roberson. Others who are directly affected by or claim to have an interest in the matter are Johnnie L. Cochran, Jr., Kenneth Roberson, Stephen Yagman and Marion Yagman.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 867 F.2d 527. The memorandum of decision and order, filed January 23, 1987, and the correcting order, filed February 9, 1987, of the United States District Court for the Central District of California are not reported.

JURISDICTION

The judgment of the Court of Appeals was rendered on January 31, 1989. A petition for rehearing with a suggestion for rehearing *en banc* was denied on April 4, 1989. A timely motion to stay issuance of the mandate was filed

and was granted on April 19, 1989. The petition for a writ of certiorari was filed on April 24, 1989 and was granted on October 2, 1989. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved is the Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. § 1988 ("§ 1988"), which provides in part as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE[1]

On December 25, 1971, Petitioner, Juan Francisco Venegas ("Venegas") was arrested with Lawrence Reyes for the murder of William Staga. After a trial by jury, they were both convicted and sentenced to life in prison. The California Supreme Court reversed Venegas' conviction on the ground of insufficiency of the evidence. *People v. Reyes,* 12 Cal. 3d 486, 116 Cal. Rptr. 217, 526 P.2d 225 (1974). The facts related to the case are contained in that opinion. *See also* Reporter's Transcript on Appeal ("RT") Vol. 1 p. 83 — Vol. 2 p. 35. Venegas served more than two and one-half years in State Prison. RT Vol. 3 p. 129.

[1]On October 30, 1989 the Court granted Petitioner's motion to be relieved from filing a joint appendix.

Thereafter Venegas filed a state court tort action against the City of Long Beach and several Long Beach police officers,[2] and on October 28, 1977, he filed a complaint in the United States District Court under 42 U.S.C. §§ 1983 and 1985 against Long Beach police officers alleging that they intentionally produced false and perjured evidence. Record on Appeal, Document No. (hereafter "R") 1.

On July 6, 1981, the district court granted defendants' motion for summary judgment on the ground that the action was barred by the statute of limitations. The Court of Appeals reversed the judgment. *Venegas v. Wagner,* 704 F.2d 1144 (9th Cir. 1983).

In 1985, Venegas was required to find a new attorney. He retained the firm of Yagman & Yagman, which remained as counsel until September, 1985. R 236 (Notice of Motion for Attorney's Fee Award, Declaration of Stephen Yagman p. 4a); R 240 (Declaration of Marion Yagman p. 1); R 242 p. 2.

Thereafter in September of 1985 Venegas and Respondent Michael R. Mitchell ("Mitchell") had discussions about Mitchell representing Venegas in the case then set for trial on November 5, 1985 (R 260 p. 10, R 254 (Declaration of Venegas p. 1)) which resulted in Mitchell and Venegas executing a contingent fee agreement. R 260

[2]The California Court of Appeal reversed a $1 million verdict in favor of Venegas. *Juan Venegas v. City of Long Beach, et al.,* 2d Civil No. 66285, Court of Appeal, Second Appellate District, Division Three (1983) (unpublished opinion), and Respondent was aware of this fact. RT Vol. 5 pp. 46-47.

p. 13.[3] (*See also* appendix to Opposition to Brief in Opposition to Petition for Writ of Certiorari.)

The agreement, dated September 18, 1985 (*Id.*), provided that Venegas would hire Mitchell to prosecute Venegas' civil rights lawsuit. Inserted in a paragraph was the following: "This agreement covers one trial only. In the event there is a mistrial or an appeal, the parties may mutually agree upon terms and conditions of Attorney's employment, but are not obligated to do so." ¶ 2. Venegas agreed to pay Mitchell a $10,000 non-returnable retainer and "Forty Percent (40%) of the gross amount recovered (prior to any deductions for costs) less the nonrefundable retainer fee actually paid." ¶ 4. Venegas was to pay all costs and expenses. The agreement further provided that "the contingent fee payable to Attorney shall be calculated based on the gross amount *recovered* prior to any deduction for costs or expenses incurred or advanced." ¶ 5 (emphasis added). The agreement added in ¶ 8 that

> [T]he right to apply for and collect any attorney fee award made by a court is Attorney's and not Client's right. Client understands and agrees that Client has no right to nor shall client attempt to waive or waive Attorney's right to apply for and collect attorney's fees. In consideration for Client's agreements, Attorney agrees that Attorney shall make appropriate applications for attorneys fees in the lawsuit. Attorney and Client agree that to the extent that attorneys fees are awarded and recovered by Attorney, the same shall, dollar-for-dollar, reduce Client's obligation to pay (or shall be refunded to Client if previously paid) attorney fees to Attorney pursuant to Paragraph 4 above. Any attorneys fees awarded by a court in excess of the amount which Client is obligated to pay pursuant to paragraph 4 above is the property of and shall be paid to Attorney.

[3]By that time pleadings and discovery had been completed. *See, e.g.*, RT Vol. 4 pp. 5, 65, 100; R 236 (Exhibit 1 to Declaration of Mitchell).

Venegas understood that Mitchell would be obligated to handle any appeal in order to obtain his fee out of amounts "recovered." Venegas declared that Mitchell told him that the court awarded fees "were his [Mitchell's] and that they never amounted to anything and that he never collected those fees." R 254 (Declaration of Venegas p. 1). Mitchell denied telling Venegas that court-awarded attorney's fees never amounted to anything, but admitted he told him, "I had never successfully collected those fees." R 256 p. 13. There is no evidence that Mitchell advised Venegas that the Civil Rights Attorney's Fee Awards Act had been passed to permit Venegas to obtain an attorney at no cost to himself. *Id.* Mitchell denies he gave Venegas any reason to understand that Mitchell was obligated to handle the appeal. *Id.*

Thereafter Venegas agreed to Mitchell bringing in an additional attorney who would receive half of Mitchell's contingency. R 254 (Declaration of Venegas p. 2).

The trial lasted about one week. RT Vols. 1-7. On February 28, 1986, the court entered judgment on a jury verdict which was unanimous (RT Vol. 7 pp. 60-61) for Venegas in the amount of $2.12 million in damages against the defendants for violations of 42 U.S.C. § 1983. After post-trial motions, two defendants remained subject to a judgment of $2.08 million. R 242 p. 2.

In the application for attorney's fees, the attorneys *requested* a total of $86,760. R 236 p. 1; R 235 p. 1. There

is no indication that in connection with the fee application, they disclosed to the court the terms of the contingent fee agreement or that the fee under that agreement would exceed $800,000. R 236 (Declaration of Mitchell p. 3); R 235 (Declaration of Roberson p. 2). Mitchell had requested a fee based only on an hourly rate. The motion for fees was opposed by the defendants. R 238.

In connection with the application for attorney's fees, the district judge determined the lodestar by multiplying the hours expended by an hourly rate. This amounted to a total of $71,710. The court then applied a multiplier because of the "excellent results obtained and contingent nature of the case" and thus awarded total attorney's fees in the amount of $117,000. The award consists of specific amounts for each of plaintiff's attorneys so that each attorney is entitled to the specific amount awarded him or her. These sums were to bear interest, compounded annually. The court concluded, "This award is reasonable in light of all of the circumstances of this case." R 242 pp. 5-7.

A judgment was entered based on the findings. R 243. Thereafter Mitchell refused to handle the appeal unless he received additional compensation. R 254 (Declaration of Venegas p. 2); R 256 pp. 13-14.

While still counsel of record, on September 23, 1986, Mitchell moved the District Court for leave to intervene to confirm a lien for his services based on the contingent fee agreement. R 260. Venegas contended that the attorneys were not entitled to greater fees than those awarded and determined by the court to be reasonable pursuant to 42 U.S.C. § 1988, and that the contingent fee agreement was invalid under state law. R 254 pp. 1-9; RT Oct. 20, 1986 p. 10. Venegas asserted that the attorneys are entitled to no more than the $117,000 awarded by the

court, while under Mitchell's theory, he and his co-counsel would be entitled to 40% of the amount recovered — a sum in excess of $800,000.[4] *Id.* (It should be recalled that the attorneys had collectively only requested the court to award fees to plaintiff in the amount of $86,760.)

Venegas was compelled to obtain new counsel to represent him on the appeal. On November 12, 1986, a stipulation was executed providing that new counsel was substituted in to replace Mitchell and his co-counsel. R 269.

On January 29, 1987, the district court entered its order denying Mitchell's right to intervene to confirm a lien. The district court, although recognizing it had the power to " 'supervise fee awards under contingent fee arrangements to avoid unreasonable results' " (R 263 p. 14) refused to reduce or eliminate any rights Mitchell purportedly had under the contingent fee agreement. The court stated that "Plaintiff's rights under Section 1988 have not been affected in any way by the contingent fee contract" and that "Mitchell's contingent fee does not constitute a windfall." *Id.* at 15. Thus, the district court concluded that a contingent fee agreement was not unen-

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[4]The Court is requested to take judicial notice (under Rule 201(f) of the Federal Rules of Evidence) of the complaint filed on March 7, 1988 in Los Angeles Superior Court ("LASC") (Case No. C 67886) by Mitchell against Venegas and his present counsel of record, for, *inter alia*, settling the case with the City of Long Beach (including the state case) after the decision of the Ninth Circuit, without Mitchell's and his co-counsel's consent, *(Johnnie L. Cochran, Jr.; The Law Offices of Johnnie L. Cochran, Jr., A Professional Corporation; Michael R. Mitchell, Plaintiffs v. Juan Francisco Venegas, Michael Bromberg, The City of Long Beach, California, and Does 1 through 20, Defendants)*, and the Yagmans' suit against Venegas for additional fees. LASC No. WEC 120719.

forceable solely because the amount of fees under it would exceed the amount awarded by the court. *Id.* at 15-17.

On February 23, 1987, Venegas filed a notice of appeal (Docket No. 87-5662) from so much of the order as refused to reduce the fees of the former attorneys to the § 1988 award. R 265.

On February 24, 1987, Mitchell filed a notice of appeal. Docket No. 87-5684; R 266. On November 9, 1987, the Ninth Circuit affirmed the original judgment of the trial court with respect to the damages, the motion for judgment notwithstanding the verdict, and the attorneys' fee. *Venegas v. Wagner*, 831 F.2d 1514 (9th Cir. 1987).

In the Ninth Circuit, in connection with the dispute with Mitchell, Venegas contended that under federal and state law the attorneys were entitled only to the reasonable fees awarded by the district court to plaintiff under § 1988.

On January 31, 1989, the Ninth Circuit reversed the district court's denial of the motion to intervene, affirmed that court's refusal to reduce the contingent fee to the court-awarded fee, and remanded the case to the district court.[5] The Ninth Circuit held that the amount of court-awarded fees did not limit the amount to which an attorney is entitled under a contingent fee agreement and that in this case, the district court did not err in finding the contingent fee agreement reasonable. On February 13,

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[5]The court noted that in order to confir a lien, "the district court would need to decide whether the contingent fee agreement is valid under California state law and, if so, whether Mitchell and Venegas intended that Mitchell enjoy an equitable lien upon the judgment." 867 F.2d at 531 n.3, 534. As to the subsequent history, *see* Petitioner's Reply Brief in Support of the Petition for Writ of Certiorari p. 2.

1989, Venegas filed a timely petition for rehearing and a suggestion for rehearing *en banc*.

The petition for hearing was denied, and the suggestion for rehearing *en banc* was rejected on April 4, 1989.

SUMMARY OF ARGUMENT

To require civil rights plaintiffs to pay to their attorneys more than the court-awarded fees because of contingent fee agreements would be contrary to the purposes of § 1988 and to public policy. By virtue of its own power and of § 1988, this Court should preclude the payment of unreasonable fees. Clearly a contingent fee which exceeds what a court has determined to be reasonable is unreasonable. Courts have the power to regulate attorney-client contracts, and courts have been particularly assertive in evaluating the enforceability of contingent fee agreements in the light of public policy.

This Court in *Blanchard v. Bergeron*, ____ U.S. ____, 109 S.Ct. 939 (1989), held that a contingent fee agreement did not impose a ceiling upon the amount of a court awarded fee which would go to the attorney. If the contingent fee agreement can be ignored for the benefit of the attorney so that he can receive a larger, reasonable fee, such an agreement should also be ignored for the benefit of the client so that he only has to pay a reasonable fee.

Enforcement of contingent fee agreements that result in fees greater than court-awarded fees involves the very problem which the Court in *Blanchard* sought to eliminate — the incentive of attorneys in civil rights cases to pursue large damages at the expense of injunctive or declaratory relief or even a reasonable settlement.

The history of § 1988 and statistics show that to preclude the enforcement of contingent fee agreements will have no effect on the availability of civil rights lawyers.

Section 1988 itself provides a basis for not enforcing the contingent fee agreement. The legislative history indicates that the intent of Congress was that the fee award establish fully the attorneys' right to compensation and that plaintiffs should not have their recoveries reduced by obligations to their attorneys. Under *Blanchard,* it was never anticipated that when the contingent fee is less than the award, the plaintiff can keep the difference. Thus it follows that a plaintiff should not be obligated to pay the attorney more than the court-awarded fee.

It would be anomalous if civil rights plaintiffs with small or no damages incur no obligation to their attorneys and are made whole but severely damaged civil rights plaintiffs are not made whole because of a large obligation to their attorneys. Another irony of Respondent's position is that a successful civil rights plaintiff may pay more in attorney's fees than the wrongdoing defendant. A civil rights plaintiff should not have the financial obligation of enforcing civil rights laws. In reviewing the legislative history and public policy, circuit courts have held that § 1988 fee awards limit what attorneys can recover under their contingent fee contracts. *Cooper v. Singer,* 719 F.2d 1496 (10th Cir. 1983) *(en banc); Wheatley v. Ford,* 679 F.2d 1037, 1042 (2d Cir. 1982).

Even if there are occasions when the attorney may obtain a contingent fee in excess of the § 1988 fee award, it is inappropriate for the court to approve of such a fee under the circumstances of this case. The contingent fee agreement is manifestly one-sided and unfair on its face. It is also unfair under the circumstances under which it was executed. There was not adequate disclosure of the

extent and likelihood of a § 1988 award. The contingent fee exceeds by a multiple of 10 both the attorneys' lodestar and the fees they requested. The district court-awarded fee included a substantial bonus — in part for the contingency factor. The contingent fee, if upheld, would provide Mitchell and his co-counsel with over $2300 per hour. This fee would be for a one week trial. The attorneys had to undertake no discovery and prepare no pleadings. All the risk was on Venegas, who paid Mitchell a nonrefundable retainer and could be obligated for defendants' fees if he lost. The case had been tried once before by different counsel and resulted in a large award, only to be reversed. So not only was the case already prepared, but a large award was likely. The attorney stopped rendering all services after the District Court level, thereby leaving the client to retain new counsel for an appeal, possible retrials and collection of the judgment. Yet the attorneys claim a vested right in over $800,000. This is unfair and contrary to law and public policy.

The federal court should not uphold a contingent fee contract which clearly is unenforceable under state law. The attorney refused to handle the appeal. The contract provided that the contingency was the recovery of monies. Whether or not the attorney was required to handle the appeal, he was obligated to insure the recovery of monies. As he did not fulfill his obligations, at best, he was entitled to a *quantum meruit* recovery — which would match the reasonable fee awarded by the court.

ARGUMENT

Congress enacted § 1988 in response to the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975) , which held that a party

generally could not recover attorney's fees from the losing party without statutory authorization.

One authority has noted:

> Although simple in its concept and terms, 42 U.S.C. § 1988 has proven to be extraordinarily complex and controversial in its interpretation and application. The growing importance of statutory attorney's fees in civil rights litigation and the absence of clear answers in the statute and its legislative history to a number of important questions have led to considerable confusion within the ranks of the civil rights bar and sharp differences among the lower federal courts. Confronted by persistent questions and conflicts, the Supreme Court has been induced to decide more than a dozen cases bearing on § 1988 fee issues since the enactment of the statute 10 years ago. The result has been the creation of a substantial body of judge-made law concerning the meaning and application of § 1988 and similar fee-shifting statutes, as the Supreme Court seeks to simplify the fee-setting analysis and to "impose some coherence on the diaspora of case law."

M. Schwartz & J. Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees* 321-22 (1986).

It is the obligation of federal courts under their supervisory power to insure that civil rights plaintiffs are not obligated to pay their attorneys unreasonable fees. In addition, a purpose of § 1988 is to make sure that successful civil rights plaintiffs do not have to sacrifice part of their awards in order to pay their attorneys. This is done by providing for the awarding of reasonable attorney's fees.

Venegas contends that by virtue of § 1988 and its purpose, as well as of the courts' supervisory power, an attorney in a civil rights case is not entitled to fees under a contingent fee contract which exceed the amount of the court-awarded fees under § 1988. The facts demonstrate in general and in this case the unfair and unintended consequences of a decision permitting an attorney to obtain as a result of a contingent fee agreement an amount in excess of the § 1988 court-awarded fee.[6]

I

THE PLAINTIFF WHO IS AWARDED REASONABLE ATTORNEY'S FEES UNDER § 1988 CANNOT BY VIRTUE OF A CONTINGENT FEE AGREEMENT BE REQUIRED TO PAY HIS ATTORNEYS AMOUNTS IN EXCESS OF THE AWARDED FEES.

A. Federal Courts Should Not Require Civil Rights Plaintiffs to Pay Their Attorneys More Than The Court-Awarded Fees.

As this Court has said, "[a] major purpose of the Civil Rights Attorney's Fee Awards Act was to benefit those claiming deprivations of constitutional civil rights." *Maine v. Thiboutot,* 448 U.S. 1, 9 (1980). This was accomplished by insuring that the successful civil rights plaintiffs would be able to have their attorney's fees paid. *See* 122 Cong. Rec. at 35117, Oct. 1, 1976 (Rep. Ashbrook). In *Hensley v. Eckerhart,* 461 U.S. 424, 435 (1983), the Court

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[6]As shall be addressed *infra,* state law precludes enforcement of the contingent fee contract under the facts of this case. That federal courts or Congress act to protect a client *vis a vis* the attorney does not preclude the state from providing greater protections. Note, *Fee Waivers and Civil Rights Settlement Offers: State Ethics Prohibitions After Evans v. Jeff D.,* 87 Col. L. Rev. 1214, 1226 (1987).

said, "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." The purpose of the legislation clearly was not to benefit lawyers, 122 Cong. Rec. at 33314, Sept. 29, 1976 (Sen. Kennedy), or to create "windfalls" for anyone. *Blanchard v. Bergeron, supra,* 109 S. Ct. 939, 946 (1989).

This Court has pointed out that civil rights cases are not viewed as simply another species of tort cases.

> We reject the notion that a civil rights action for damages constitutes nothing more than a private suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely on monetary terms.

City of Riverside v. Rivera, 477 U.S. 561, 574 (1986). That is why "the enforcement of civil rights laws cannot be entrusted to private fee arrangements" (*Id.* at 579) or to tort system practices (which are fueled by insurance).

The goal of § 1988 should be implemented not only by the application of the statute itself, but also by the power of the Court to regulate attorney-client fee arrangements related to federal actions. *See Krause v. Rhodes,* 640 F.2d 214, 218-19 (6th Cir. 1981).[7] "The relevant principle is well established: a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Town of Newton v. Rumery,* 480 U.S. 386, 392 (1987).

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[7]The United States Supreme Court has exercised supervisory power over local rules relating to attorneys. *See Frazier v. Heebe,* 482 U.S. 641 (1987).

All of the rulings of this Court with respect to § 1988 fees are to insure that with respect to the parties and their attorneys, fees are reasonable. The Court has not immunized the attorney-client relationship from its scrutiny. Indeed, it would be anomalous for the Court to require the payment of a fee which exceeds the reasonable court-awarded fee, because such a fee is by definition unreasonable.

In *Blanchard v. Bergeron, supra,* 109 S.Ct. 939 (1989), the Court dealt with the effect of a private fee agreement on an award under § 1988. The Court held that a contingent fee agreement did not place a ceiling upon the fees recoverable by a prevailing plaintiff in a civil rights action. Although the case dealt with the amount to be paid by the defendant, the effect was to provide plaintiff's counsel with monies which exceeded the amount to which he was entitled under his contract with the client, because the attorney, in effect, has a direct interest in court-awarded fees. *See Evans v. Jeff D.,* 475 U.S. 717, 730 n.19 (1986).[8] Note, *Fee as the Wind Blows: Waivers of Attorney's Fees in Individual Civil Rights Actions Since Evans v. Jeff D.,* 102 Harv. L. Rev. 1278, 1295 (1989). There is no indication that the Court believed that the civil rights plaintiff could enforce the agreement with the lawyer and thereby keep the excess of the fees awarded as a "windfall." Indeed the Court suggested that the attorneys would derive that excess when it noted that its ruling would not result in a "windfall" to the *attorneys. Blanchard v. Bergeron, supra,* 109 S.Ct. at 946.

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[8]Whether or not the attorney has technical standing to apply for such statutory fees, the attorney makes the motion for fees in the name of the party but for the benefit of the attorney. Moreover, the contract in this case provided for the attorney's right in the fee award and even to apply for it. (R 260 p. 13 ¶ 8).

In *Blum v. Stenson,* 465 U.S. 886 (1984) the court held that a plaintiff is entitled to an award of attorney's fees under § 1988 even though the plaintiff was represented by a non-profit public interest law firm. Thus the plaintiff was awarded the fees, even though plaintiff had no obligation to the public interest law firm, which firms are generally precluded from having fee agreements with clients. *Evans v. Jeff D., supra,* 475 U.S. at 755 n.10 (dissenting opinion). No one could seriously contend that the plaintiff is entitled to keep the awarded fee monies. Indeed, public interest law firms derive a portion of their funding from these awards. *Id.* at n.7; Note, *Fee Waivers and Civil Rights Settlement Offers: State Ethics Prohibitions After Evans v. Jeff D.,* 87 Col. L. Rev. 1214, 1217 n.19 (1987) (NAACP Legal Defense and Educational Fund receives an average of 20% of its annual budget from court-awarded fees.). The Court ignored the relationship between the client and attorney — which provided for no fees — and required a fee award which would go to a lawyer not entitled to a fee from the client. This is another example of the Court fashioning a remedy directly benefiting the attorney irrespective of the plaintiff-attorney arrangement. Again, if the Court is to pierce the plaintiff-attorney relationship for the benefit of the attorney, it should also be willing to do so for the benefit of the client.

In *Blanchard,* the Court in support of its decision, set forth various considerations which are equally applicable to the issue in the instant case. The Court noted that if the contingent fee agreement limited attorney's fee awards, "an undesirable emphasis might be placed on the importance of the recovery of damages in civil rights litigation." 109 S.Ct. at 945. The Court added:

> The intention of Congress was to encourage successful civil rights litigation, not to create a special incentive to prove damages and shortchange efforts to seek effective injunctive or declaratory relief. Affirming the decision below would create an artificial disincentive for an attorney who enters into a contingent fee agreement, unsure of whether his client's claim sounded in state tort law or in federal civil rights, from fully exploring all possible avenues of relief. Section 1988 makes no distinction between actions for damages and suits for equitable relief. Congress has elected to encourage meritorious civil rights claims because of the benefits of such litigation for the named plaintiff and for society at large, irrespective of whether the action seeks monetary damages.

Id.

An attorney with an enforceable contingent fee contract would have the same "incentive to prove damages and shortchange efforts to seek effective injunctive or declaratory relief" whether or not a contingent fee agreement was a limitation on the award of attorney's fees.

The Court in *Blanchard* also referred to the purpose of § 1988, and indicated enforcement of a contingent fee contract was contrary to the statute. Thus, the Court said,

> As we understand § 1988's provision for allowing a "reasonable attorney's fee," it contemplates reasonable compensation, in light of all of the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, *no more and no less.* . . . And Congress implemented its purpose by broadly requiring all defendants to pay a reasonable fee to all prevailing plaintiffs, if ordered to do so by

> the court. Thus it is that a *plaintiff's recovery will not be reduced by what he must pay his counsel.*

Id. at 944 (emphasis added). Thus the Court made clear that the purposes of the act are served by the payment of reasonable attorney's fees to the attorney regardless of the fee contract between a plaintiff and his or her attorney.

To say that lawyers should be relieved from the obligations of a contingent fee agreement so that they can receive the full amount of the court-awarded fees, but that they are entitled to enforce their contingent fee agreement when it would mean they would receive more than the court-awarded or reasonable fee is not only illogical, but runs counter to the expressed underlying policies behind § 1988 as recognized by this Court.

The Ninth Circuit's position would lead to other bizarre results. The plaintiff with small or no damages would receive the benefit of § 1988's fee shifting approach. Such a plaintiff would be made whole. But a plaintiff, such as Venegas, who has suffered large damages, would not receive the full benefit of the fee shifting concept and would not be left whole. In short, the Ninth Circuit approach leads to the irony of discrimination against certain, more aggrieved, civil rights plaintiffs. Also, as this case demonstrates, the Ninth Circuit position can result in a successful civil rights plaintiff paying more attorney's fees than even the wrongdoing defendant.

The Court in *Blanchard* suggested the possibility that in determining a reasonable fee under § 1988, the contingency aspect is a "factor." *Id.* at 944-45; *see also Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987). To whatever extent the contingency factor is an element of the fee award, the fee award

represents a judicial determination of the reasonable amount of fees. The successful client should not have to pay to the attorney an amount in excess of a reasonable fee. Moreover, any "contingency factor" in court-awarded fees should provide sufficient incentive to attorneys to undertake the cases.

The Court in *Blanchard* also cited *Cooper v. Singer*, 719 F.2d 1496 (10th Cir. 1983), for the proposition that a § 1988 fee award should not be limited by a contingent fee agreement between the attorney and his client. 109 S.Ct. at 942-43 n.4. In this regard the court in *Cooper* (which was decided following an *en banc* hearing) stated,

> *We conclude that if the client's section 1988 fee award . . . is less than the amount owed to the attorney under the contingent fee agreement, then the lawyer will be expected to reduce his fee to the amount awarded by the courts. S*e *Wheatley v. Ford,* 679 F.2d 1037, 1042 [*sic*] (2d Cir. 1982). On the other hand, if the fee award is greater than the amount owed to the attorney under the contingent fee agreement, then the attorney shall be entitled to the full amount of the fee award.

719 F.2d at 1506-07 (emphasis added). Thus the court in *Cooper* made clear that the logic of the *Blanchard* holding compels the attorney "to reduce his fee to the amount awarded by the courts." The court in *Cooper* added, "We also conclude that Congress intended that the section 1988 fee award would fulfill the plaintiff's fee obligations." *Id.* at 1507.

In *Wheatley v. Ford*, 679 F.2d 1037, 1041 (2d Cir. 1982) the court stated that it was "concerned about the relationship between the section 1988 award and counsel's contingency fee arrangement with his client." The court stated,

"the civil rights statutes should not be construed to provide windfall recoveries for successful attorneys" and then concluded,

> This Court has the power to formulate a fee award designed to avoid such an extreme result. *Sargeant v. Sharp, supra,* 579 F.2d at 648. *See also* Model Code of Professional Responsibility, Canon 13 ("a contract for a contingent fee . . . should always be subject to the supervision of a court, as to its reasonableness"). Pursuant to this supervisory power, we hold that, to the extent counsel receives payment of the section 1988 statutory award, his claim for services rendered under his contingency fee arrangement with his client shall be deemed paid and satisfied. This result gives full effect to the Congressional desire to promote private enforcement by allowing citizens "the opportunity to recover what it costs them to vindicate these rights in court."

As the facts in the instant case demonstrate, to allow the attorney to enforce a contingent fee agreement in civil rights cases when the court has made an award of reasonable attorney's fees, would contravene sound public policy.

The federal courts' regulatory powers over attorney-client fee arrangements have been particularly pronounced in connection with contingent fee contracts. *See* 1 M. Derfner & A. Wolf, *Court Awarded Attorney Fees* 6-16 (1989) (hereafter "Derfner & Wolf").

An authority stated,

> The federal courts have employed their powers to limit private fee contracts.... While fee contracts between lawyer and client should ordinarily be enforced, the courts have noted: "Fee contracts between attorney and client are of special interest and concern to the courts. They are not to be enforced upon the same basis as ordinary commercial contracts," and that "special concern" is particularly applicable to contingent fee contracts.

Id.; see also Dunn v. H.K. Porter Co., Inc., 602 F.2d 1105, 1108-09 (3d Cir. 1979); *McKenzie Const., Inc. v. Maynard,* 758 F.2d 97, 101 (3d Cir. 1985); *International Travel, Etc. v. Western Airlines,* 623 F.2d 1255, 1277 (8th Cir. 1980); *R. Aronson, Attorney-Client Fee Arrangements: Regulation and Review - Report to the Federal Judicial Center* 74-118 (1980); F. B. Mackinnon, *Contingent Fees For Legal Services* (1964); 1 S. Speiser, *Attorneys' Fees* 81-128 (1973); Brimelow & Spencer, *The Plaintiff Attorneys' Great Honey Rush,* 144 Forbes 197 (Oct. 16, 1989) ("A startlingly large part of the recent massive damage awards goes to the lawyers."); Note, *Contingent Fee Contracts: Validity, Controls, and Enforceability,* 47 Iowa L. Rev. 942, 946, 949 (1962). An agreement between an attorney and client, particularly a contingent fee contract, is subject to such scrutiny because of the inherent unequal bargaining power of the parties and the risk of misunderstanding and even overreaching. 47 Iowa L. Rev. at 963 ("To ignore the possibility that lawyers may misuse contingent fee contracts would, of course, be unrealistic.").

As a result, courts are willing to render agreements unenforceable when they contravene public policy. The enforcement of contingent fee awards when the court has awarded attorney's fees in a civil rights case is particularly inappropriate.[9] Contingent fee contracts are often

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[9]We do not suggest that all fee shifting provisions should result in the ban of contingent fees. It should be noted that "[s]ystems with general two-way fee shifting commonly ban contingent fees." Rowe,

not enforceable when the attorney's financial interest in the outcome of the litigation is considered detrimental to an important state interest. *See* Model Code of Professional Responsibility of the American Bar Association, DR 2-106(C), EC 2-20; 41 U.S.C. § 254(a). The ABA Code of Professional Responsibility imposes substantial limitations upon contingent fee contracts. The provisions are, according to the drafter's footnotes, based upon Canon 13 of the former ABA Canons of Professional Ethics (adopted in 1908) which provides that the contingent fee must be reasonable and always subject to the supervision of the court as to its reasonableness. *See Krause v. Rhodes,* 640 F.2d 214, 219 (6th Cir. 1981).

Civil rights cases often involve sensitive matters and the expenditure of public funds. Often the cases can be resolved satisfactorily with small monetary relief, injunctive relief or declaratory relief. The availability of windfall contingencies may shift the emphasis to efforts to obtain large damages. In addition, contingent fee contracts, as the one in the instant case, often contain clauses which may inhibit the settlement of the dispute.[10] As set forth in the fee agreement in this case, the attorney is virtually a co-venturer in the litigation. In this regard, with respect to public interest cases, one authority has written,

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The Legal Theory of Attorney Fee Shifting: A Critical Overview, 1982 Duke L. J. 651, 673 .

[10]The agreement contains a clause (¶ 8) purporting to preclude Venegas from waiving attorney's fees. As to the enforceability of such a provision in light of the ruling in *Evans v. Jeff D.,* 475 U.S. 717 (1986), *see* M. Schwartz & J. Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees* 581 (1986); indeed in the state court action referred to *supra* at n.4, Mitchell claims that Venegas owed him a fiduciary duty to obtain Mitchell's consent to a settlement.

> [A]warding attorneys' fees based upon results fundamentally misconceives the role of the lawyer. A lawsuit is not an investment in a uranium mine in which the lawyer is a co-venturer. Rather it is an attempt by the plaintiff to obtain redress for a legal injury. To this endeavor attorneys contribute their time, advocacy skills, and professional judgment — not their capital. Fully compensating the attorneys for the time they have invested is therefore not only sufficient to provide the necessary incentives, but additionally is consistent with the function of lawyers to bring the disinterested professional judgment to their cause.

Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?,* 126 U. Pa. L. Rev. 281, 318 (1977).

The link between the size of the verdict on the recovery and the amount of compensation received by the attorney may not be appropriate in civil rights cases. The attorney recovers greater compensation for the same amount of work if damages sought and recovered are inflated. This is unfair to defendants and is inimical to the judicial system. On the other hand, if recoveries are not inflated, and the plaintiff recovers an amount to compensate him for his damages, any amount paid by the plaintiff to the attorney results in the plaintiff receiving less than that to which he was fairly entitled.

Interestingly, it has been suggested that courts award civil rights plaintiffs less fees than commercial rights plaintiffs. Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?,* 126 U. Pa. L. Rev. 281, 292, 310-11 (1977). Thus a civil rights plaintiff who has to pay his attorney would, on a percentage basis, generally have to pay more out of his recovery than a commercial plaintiff.

Moreover, it is certainly not fair that a successful civil rights plaintiff must have the financial obligation, in addition to his or her personal commitment, to enforce this Nation's civil rights laws.

Thus case law and policy support the rule precluding contingent fee payments which exceed the § 1988 court-awarded fee.

B. By Virtue of § 1988, Civil Rights Plaintiffs Should Not Be Compelled to Pay Their Attorneys More Than The Court-Awarded Fees.

Although § 1988 does not deal explicitly with many factors concerning its implementation, the Court has been creating guidelines to effectuate the statute's purpose. Thus, not only is the purpose of § 1988 relevant to the exercise of this Court's power to deal with fees and fee agreements in civil rights cases, but also the statute itself, as an independent ground, supports Venegas' position.[11]

Under § 1988, the court is to award reasonable attorney's fees. The fees are for the attorneys, whether or not paid or payable to the plaintiff. *See supra.* Indeed, in this case the court awarded specific amounts to specific attorneys.

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[11]Some fee shifting statutes made no reference to the disposition of fees between attorney and client. *See* 15 U.S.C. § 15 . Some statutes have provided that fee shifting provisions do not limit the amount of fees that an attorney and his client might agree upon between themselves. *See* statutes set forth in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 252-255 (1975). And some statutes expressly limit the attorney's recovery. *See* 1 Derfner & Wolf 5-47. Thus the absence of any provision dealing specifically with the attorney-client relationship does not necessarily signify an intent not to cover the attorney's recovery.

In light of this allocation, it would be unreasonable and not in conformity with the statute if the attorneys ignored the judge's allocation and claimed larger amounts. Indeed, courts can and do set aside private fee-sharing agreements when they depart from the allocation made by the court. *See In Re Agent Orange Product Liability Litigation,* 818 F.2d 216, 222-226 (2d Cir. 1987). By the same reasoning the statute should not be read to permit attorneys to continue to litigate against the plaintiffs for larger fees, when under the statute, the court has determined the reasonable fees to which the attorneys are entitled.

If § 1988 was not applicable to the plaintiff-attorney fee arrangement, the plaintiff in *Blanchard v. Bergeron, supra,* 109 S.Ct. 939 (1989) could refuse to pay to his attorney the difference between the contingent fee and the larger court-awarded amount. This is obviously illogical.

If § 1988 court-awarded fees do not supersede contingent fee agreements, there would not only be undesirable results, but the purpose of the statute and the intent of Congress would be frustrated.[12]

The intent of Congress and purpose of § 1988 was to insure that successful civil rights plaintiffs would have their attorney's fees paid by the court award while avoiding attorneys receiving "windfalls."

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[12]A statute could be interpreted so that it will not lead to unreasonable results so long as such an interpretation is consistent with the legislative purposes. *See Perry v. Commerce Loan Company,* 383 U.S. 392, 399-400 (1966). *See generally,* Note, *Intent, Clear Statements, and the Common Law; Statutory Interpretation in the Supreme Court,* 95 Harv. L. Rev. 892, 912-915 (1982); *Evans v. Jeff D., supra,* 475 U.S. at 743-45 (dissenting opinion).

The Court in *Blanchard,* in noting that a purpcse of § 1988 "is that a plaintiff's recovery will not be reduced by what he must pay his counsel," 109 S.Ct. at 944, is supported by the legislative history.

The report of the Committee on the Judiciary on this Act, 94th Congress, 2d Session, House of Representatives Report No. 94-1558, 1976 (hereinafter "H.R.") stated with regard to the recovery of attorney's fees, "The application of these standards will insure that *reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys." H.R. at 9 (emphasis added).*

In the debates on the bill in the House of Representatives, Rep. Ashbrook said of the bill "My colleague . . . pointed out the thrust of this bill was, in effect, to put individuals into a position of not being harassed by the Government, and, if they are, then at *least allow them to seek redress for their grievances and be able to have their attorney's fee paid if they prevail."* 122 Cong. Rec. at 35117 (Oct. 1, 1976) (emphasis added).

In the Senate, the Judiciary Committee Report No. 94-1011 (hereinafter "S.R.") stated: "If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, *then citizens must have the opportunity to recover what it costs them to vindicate these rights in court."* S.R. at 2 (emphasis added).

Speaking of the bill in the Senate, Senator Tunney, who sponsored the bill in its original form, made it clear that the plaintiff was to pay no fee when he said:

> When Congress calls upon citizens . . . to go to court to vindicate its policies and benefit the entire Nation, Congress must also ensure that they have the means to go to court, and to be effective once they get there. *No one expects a policeman, or an officeholder, to pay for the privilege of enforcing the law. It should be no different for a private citizen. . . .*

122 Cong. Rec. at 33313 (Sept. 29, 1976) (emphasis added). After quoting from *Knight v. Auciello,* 453 F.2d 852 (1st Cir. 1972), the Senator continued, "We cannot hope for vigorous enforcement of our civil rights laws unless we, in the words of the *Knight* court, '*remove the burden from the shoulders of the plaintiff seeking to vindicate the public right.' That is what this bill does and why it is so vital."* 122 Cong. Rec. at 33314 (emphasis added).

That Congress opted for the court to determine the extent of the client's fee obligation was spelled out by Senator Kennedy, the sponsor of the bill that was passed. He took exception to those of his colleagues who called the bill "a lawyer's bill." He stated,

> Even with enactment of this bill, the lawyer who undertakes to represent a client will face more uncertainty of payment than one involved in a usual contingent fee case. *His fee is contingent not only upon his success, but also upon the discretion of the judge before whom he appears. . . .*
>
> Even if he wins his case and the judge decides he has won a fee as well, *his rate of compensation is fixed not by a grateful client, but by a disinterested judge.* In the traditional contingency case, the lawyer is assured of a high percentage of a monetary award should he win. If the proponents of this bill were interested in creating a relief fund for lawyers, they would have surely gone about it in a different way.
>
> No, this bill is not for the purpose of aiding lawyers. The purpose of this bill is to aid civil rights.

122 Cong. Rec. at 33314 (Sept. 29, 1976) (emphasis added).

The court in *Cooper v. Singer, supra,* 719 F.2d at 1504, said, "The Legislative history on this issue is sparse; nevertheless it seems to imply that the fee award should fully define the attorney's right to compensation"; *see also Kirchoff v. Flynn,* 786 F.2d 320, 323 (7th Cir. 1986) ("As the district court said, the (or a) policy behind § 1988 is to ensure that the plaintiffs keep the whole recovery.").

Certainly Congress never intended that attorneys in a civil rights case would be able to recover approximately eight times a generous court fee award and thereby deprive a civil rights plaintiff of close to 40% of his recovery. And it was never intended by Congress that successful civil rights plaintiffs must shoulder the economic expense of enforcing the civil rights laws.

To interpret § 1988 to govern in this case does not displace or preempt state law. There is no state law that requires the enforcement of contingent fees contracts. Indeed, as noted *infra,* the contract in the instant case violates state law.

The Ninth Circuit suggests that a limitation on contingent fee agreements "would discourage attorneys from agreeing to represent civil rights plaintiffs" and therefore would conflict with a purpose of § 1988. 867 F.2d at 532.

It is important to recognize that contingent fee agreements will likely only benefit a small percentage of the lawyers who handle civil rights cases. Most civil rights cases are handled by legal aid organizations. Few cases result in large damage awards. Indeed, a large percentage of cases involve only injunctive relief. *See Evans v. Jeff D., supra,* 475 U.S. at 755 n.7, 756 n.10 (dissenting opinion). That the availability of the contingent fee did not result in

attracting civil rights practitioners is demonstrated by the need for the enactment of § 1988.

The instant case demonstrates that court-awarded fees can be sufficient incentive to attract civil rights attorneys. The court awarded Mitchell twice the fee he would normally charge. Yet he now wants more than ten times his normal fee. Indeed the district court, in increasing the fee, gave credit for the contingency factor.

If the availability of contingent fees were a factor, one would expect that this would be reflected in the number of private filings of civil rights cases in the Second and Tenth Circuits after the announcement of their rules to limit attorneys to the reasonable fee provided by § 1988. The following comparison of the number of civil rights filings in the Second and Tenth Circuits with those in the Ninth and Third Circuits (in which contingent fee contracts have been held enforceable) indicates no impact of the rulings limiting contingent fees:

PRIVATE CIVIL RIGHTS FILING BY CIRCUIT[13]

YEAR	2D CIR	3D CIR	9TH CIR	10TH CIR
1980	940	878	1517	615
1981	1139	1002	1804	736
1982	1357	1077	1641	871
1983	1475	1221	1909	1019
1984	1587	1341	2258	1173
1985	1488	1372	2031	1117
1986	1512	1436	2049	1221
1987	1387	1404	2087	1162
1988	1462	1430	1959	1172

[13]Annual Report[s] of the Director of the Administrative Office of the United States Courts (1980) pp. 377-381, (1981) pp. 370-374, (1982) pp. 219-225, (1983) pp. 249-255, (1984) pp. 257-263, (1985)

Moreover, as the Court in *Cooper v. Singer, supra,* 719 F.2d at 1506–n.14, noted, if attorneys are not taking meritorious cases because the fees are inadequate, the courts are not fulfilling their obligations under § 1988 to award reasonable fees.

Finally, the notion that only the possibility of exorbitant fees, and not just fair compensation, is necessary to entice attorneys to handle civil rights cases is somehow inconsistent with this Court's pronouncements on the obligations of attorneys to provide legal services to those who cannot afford them. *Mallard v. United States District Court,* ___ U.S. ___, 109 S. Ct. 1814, 1822-23 (1989).

Other Supreme Court cases cannot be read to support Mitchell's position. The Ninth Circuit, in its opinion in this case, refers to the statement in *Evans v. Jeff D.,* 475 U.S. 717, 731-32 (1985) that Congress enacted § 1988 in order to add fee awards "to the arsenal of remedies available to combat violations of civil rights." 867 F.2d at 532. The Court was obviously referring to *remedies* such as damages, injunctive relief and declaratory relief. A contingent fee agreement between an attorney and client is not a remedy.

The plurality in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711 (1987) alludes to the possibility that there may be situations in which the damages may be significant enough to obtain counsel. But the plurality added it was not persuaded "that without the prospect of being awarded fees exceeding . . . reasonable payment, plaintiffs with such cases will be unable to secure the help that the statutes aimed to provide." *Id.* at 726. The dissenting opinion also notes that "plaintiffs

pp. 285-291, (1986) pp. 182-188, (1987) pp. 185-191, (1988) pp. 188-194.

might be able to hire counsel in any event through private contingency arrangements," but added that such a possibility was not considered sufficient and that was why Congress enacted § 1988. *Id.* at 744. The Court in *Delaware Valley* did not address the issue of the validity of contingent fee awards that would exceed court-awarded fees.

Moreover, holding that court-awarded fees supersede a contingent fee agreement does not necessarily have to invalidate all contingent fee agreements. Although the Court has not reached, and need not reach, the issue, it may be that if a plaintiff with a contingent fee contract elects to settle the case and waive court-awarded fees prior to an award of those fees (*Evans v. Jeff D., supra,* 475 U.S. 717), the plaintiff might arguably still be obligated under the contingent fee agreement. In the instant case it is the court determination of reasonable fees that supersedes the attorney-client arrangement.

Also a plaintiff may have a state law tort claim pendent to a civil rights claim. Such claims are common involving individual police misconduct. In these cases, the contingency agreement would be more appropriate for the tort, as there probably would be no state fee-shifting provision. Indeed, the plaintiff could lose on the civil rights claim, but prevail in the state tort claim. *See Paul v. Davis,* 424 U.S. 693, 699-701 (1976) . In such a situation the plaintiff is not a prevailing party for purposes of the fee award. *See, e.g., Raley v. Fraser,* 747 F.2d 287, 290-92 (5th Cir. 1984).

Thus for these reasons there could be a role for contingent fee agreements even if court-awarded fees limit the contingent fee in the event of a judgment on the civil rights claim.

There are cases suggesting that a contingent fee contract may be enforceable by the attorney regardless of the statutory fee award. *E.g., Sullivan v. Crown Paper Board Co., Inc.*, 719 F.2d 667 (3d Cir. 1983);[14] *Hamner v. Rios*, 769 F.2d 1404, 1409 (9th Cir. 1985) ; *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 923 (8th Cir. 1986).[15] But after *Blanchard*, such decisions make no sense, because, as argued *supra*, the client cannot enforce the contingent fee agreement against the lawyer when the fee award exceeds the amount recoverable under the contingent fee agreement.

Accordingly, this Court should establish that an attorney is not by virtue of a contingent fee arrangement entitled to receive from a civil rights plaintiff more than the court-awarded fees.

II

UNDER THE FACTS OF THIS CASE THE PLAINTIFF SHOULD NOT HAVE TO PAY HIS ATTORNEY MORE THAN THE AMOUNT OF THE § 1988 AWARD.

Even if there are occasions for counsel to obtain a fee in excess of that allowed by the court under § 1988, it is inappropriate for counsel to receive such a fee in this case. See *Hamner v. Rios*, 769 F.2d 1404, 1409 (9th Cir. 1985) (court empowered to supervise contingent fee agreements to avoid unreasonable results). And this is so whether or not the state law is applicable. It is clear that a district court abuses its discretion when it allows a fee based on a contingency fee contract without carefully considering the appropriate legal and ethical factors, including those relating to the reasonableness of fees set forth in DR 2-106(B) of the ABA Code of Professional Responsibility. *Hoffert v. General Motors Corp.*, 656 F.2d 161, 166 (5th Cir. 1981).

Federal courts can restrict or limit private fee agreements without recourse to state law. *Id.*; 1 Derfner & Wolf § 6.03 at 6-12.6 - 6-13. Indeed, the district court in this case declared that it had the discretion to determine that the contingent fee agreement was unenforceable. Both the district court and the Court of Appeals, however, simply determined that an attorney could receive more under a contingent fee agreement than the amount of the court fee award. Neither court considered the full factual picture, nor the relevant ethical and legal factors.

When Mitchell and Venegas executed the contingent fee agreement, the case was basically ready for trial. The case had been tried once before, and discovery and pleadings had been completed. The likelihood of a substantial recovery was great, as Venegas had already had a jury in state court award him $1 million. The trial lasted only one week. There is no indication that a lengthier trial was anticipated at the outset. Mitchell's alleged time on the matter was 216.4 hours. His co-counsel's alleged time was 125.6 hours.

Under the "contingent fee" agreement, Venegas paid Mitchell a $10,000 nonrefundable retainer. Thus Venegas was at risk, for if he lost, he would not only be subject to paying defendant's attorney's fees, he forfeited the

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[14]The court said, however, that an attorney should only recover both the statutory fee and the contingent fee (a "dual recovery") when the claim involves civil rights of broad significance and for a large class. 719 F.2d at 670.

[15]Some courts have noted the issue but have declined to express an opinion. See, *e.g., Boston & Maine v. Sheehan, Phinney, Bass & Green*, 778 F.2d 890, 896 n.6 (1st Cir. 1985); *Daly v. Hill*, 790 F.2d 1071, 1085 n.19 (4th Cir. 1986).

$10,000 "retainer." Mitchell had a 40% contingency for one trial only. Such a provision appears to be unusual.[16] *See* ABA Model Rules of Professional Conduct, comment to Rule 1.5 ("An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest."). Thus, in the event of a mistrial, appeal, and retrial, Venegas would presumably have to offer Mitchell still a larger percentage of any recovery or try to hire new counsel — which might be difficult because of problems of allocating fees among the various attorneys. That the attorney is free to withdraw as counsel after one trial and yet retain a 40% interest in any recovery is manifestly oppressive.

While there is some dispute as to what was said at the time, there is no dispute that Mitchell did not explain to Venegas the full ramifications of a right to a § 1988 award. Venegas had no idea of the likelihood and extent of the fees in the event he prevailed. Indeed, he was led to believe a recovery of fees was unlikely. As Venegas was in need of an attorney for a trial scheduled shortly thereafter, he had little bargaining power. There is no indication that he had any independent advice with respect to the

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[16]One authority on contingent fees notes that "a common pattern in personal injury litigation" is a "series of increasing percentage rates which are applicable to the recovery depending upon the stage in the prosecution which has been reached before recovery, e.g., one-quarter if settled before trial, one-third if recovered during or after trial, and 40% if recovered on appeal. . . ." F.B. Mackinnon, *Contingent Fees for Legal Services* 65-66 (1964). This is not to say a 40% fee is always unconscionable, but in this case that fee along with the one trial provision and other provisions render the agreement unconscionable. *See* Aronson, *Attorney-Client Fee Arrangements: Regulation and Review* 90-91 (1980) (as to whether certain percentages are unconscionable).

agreement. Certainly ethical standards and fiduciary responsibilities imposed upon Mitchell a duty to disclose fully all relevant factors and alternative fee arrangements before entering into the contingent fee agreement. *See* ABA Code of Professional Responsibility EC 2-19, 2-20, 5-7 ; ABA Model Rules of Professional Conduct, Rule 1.5 and comment thereto ("When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications.").

After the trial, Mitchell refused to handle the appeal without extracting additional compensation. Thus he withdrew as counsel before the case was completed and before any recovery.

Despite these facts, Mitchell and his co-counsel are demanding in excess of $800,000. That amounts to in excess of $2,300 per hour. With interest, this may well be even higher.

It must be remembered that although Venegas' judgment was substantial, it constitutes compensation for enduring several years in prison for a crime he did not commit. To now require him to pay 40% of that award to an already well-compensated attorney is hardly fair.

Even if a federal court is to review or supervise the propriety of the attorney-client fee arrangement in civil rights cases in which a fee has been awarded, it is clear that the district court's standard of review or supervision in this case was minimal. Indeed, it is difficult to conceive of a more appropriate case for judicial intervention.

The contingency in the contingent fee contract was the recovery of money. Contingent fee contracts have been interpreted to include appellate services and services to collect the judgment. *See* 1 S. Speiser, *Attorney's Fees* 116-

119 (1973 & Supp. 1988). Although the contract in issue purports to exclude the appeal, Mitchell was still obligated to collect and enforce the judgment. Having not completed his services, he should not be entitled to his contingent fee. Rather, at best, he should be entitled to *quantum meruit.* As discussed *infra,* this is the California rule which should be applicable. Moreover this should be the rule applied by the federal courts in their supervisory power over contingent fee contracts and the attorneys who appear before them. *See Estee Candy Co. v. United States,* 343 F.Supp. 1362 (Cust. Ct. 1972). There is no inconsistency between state law and the policies underlying § 1988. Thus state law principles can be applied by federal courts in § 1988 actions. *See Robertson v. Wegman,* 436 U.S. 584 (1978).

Under Mitchell's theory, once he tries the case, he and his co-counsel are entitled to $800,000 even though there may be an appeal, retrials and collection efforts yet to be performed by others. This cannot be the law.

In the event this Court adopts the principle that the attorney may in some circumstances retain a contingent fee in excess of a § 1988 award, the Court should make clear that such circumstances are not present in the instant case.

III

A FEDERAL COURT IN A CIVIL RIGHTS CASE SHOULD NOT UPHOLD THE REASONABLENESS OF A CONTINGENT FEE AGREEMENT WHICH IS UNENFORCEABLE UNDER STATE LAW.

The federal court should not deem reasonable or otherwise permit a contingent fee contract in a civil rights case which is not enforceable under state law. *See* 1 Derfner &

Wolf § 6.02 at 6-5[17]; *cf. Cook v. Moran Atlantic Towing Corp,* 79 F.R.D. 392, 394 (S.D.N.Y. 1978).

In the instant case, the contingency, i.e., the *recovery,* had not taken place at the time Mitchell was replaced as Venegas' attorney. Because of the appeal, any *recovery* was contingent.[18]

In *Fracasse v. Brent,* 6 Cal. 3d 784, 100 Cal. Rptr. 385, 494 P.2d 9 (1972), the California Supreme Court held that an attorney who has been discharged with or without cause by his client is not entitled to the full fee specified in the contract of employment but only the reasonable value of his services, upon the occurrence of any contingency contemplated by his contract.

Mitchell claims that by handling his "one trial only" he fulfilled his obligations and had a vested claim to a then unmatured and uncollected recovery. If the agreement were interpreted or enforced as Mitchell suggests, it would be against public policy. The contingency required a recovery, and it was Mitchell's obligation to effect the recovery whether or not he handled the appeal. *Dalzell v. State Bar,* 6 Cal. 2d 433, 438, 57 P.2d 1300 (1936) . Under *Fracasse v. Brent, supra,* 6 Cal. 3d at 784, Mitchell is only entitled to the reasonable value of his services.

Moreover, under California law, when a client is not fully informed of the availability of court-awarded fees, an attorney is not entitled to enforce the contingent fee agreement. Thus in *Denton v. Smith,* 101 Cal. App. 2d 841, 226 P.2d 723 (1951) the Probate Code provided for a fee to be fixed by the court, but the attorney attempted to

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[17]As noted *supra,* the court may apply "federal law" (1 Derfner & Wolf §§ 6.02, 6.03) so long as it is not less restrictive than state law.

[18]In Venegas' case there had already been two appellate reversals.

recover a greater amount under a contingent fee agreement. The court said,

> While he stated he read the contract, it does not appear that Denton informed him that the fees allowed to an attorney in the probate of an estate were set forth in the Probate Code. It would seem unreasonable to suppose that if Smith were informed of the percentage allowed as attorney's fees by law in probate proceedings, he would then have signed an agreement to pay several times that amount for services which would have been unnecessary under the circumstances disclosed.
>
> . . . It should be noted that defendant Smith had no independent advisor at the time and did not understand the contract; that plaintiff did not explain to him the limitations of attorney's fees allowed in probate matters. Under the circumstances, plaintiff was precluded from recovering more than a reasonable sum as attorney's fees for his services.

101 Cal. App. 2d at 844, 226 P.2d at 724-25 (citations omitted).

In the instant case, it is uncontradicted that Mitchell did not explain to Venegas the nature or likelihood of a § 1988 fee award and that Venegas did not have any independent advisor.

Moreover, California Business and Professions Code § 6147(a)(3) (West Supp. 1989) requires that every contingent fee contract provide "a statement that the fee is not set by law but is negotiable between attorney and client." This provision was included in the contract between Venegas and Mitchell. (¶ 4.) Venegas contends that the representation in the contract was not true because the fees are set by the court.

It is axiomatic that a federal court should not be a party to the enforcement of a contract which violates any law or contravenes public policy. *See United Paperworkers Intern. Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987); *see also* 1 Derfner & Wolf § 6.02 at 6-5 (general applicability of state law to fee agreements).

Inasmuch as the enforcement of the contingent fee agreement is manifestly contrary to state law, the federal court should declare its unenforceability and certainly should not uphold its reasonableness.[19]

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[19]In the event this Court does not by its decision render the contingent fee agreement unenforceable, the enforceability, including factual issues, will still have to be resolved. Indeed, in California the client can require fee disputes to be resolved initially by arbitration. Cal. Bus. & Prof. Code § 6200(c) (West Supp. 1989).

CONCLUSION

The judgment of the Court of Appeals should be reversed and the district court should be directed to deny Mitchell's motion to confirm a lien and insofar as such lien exceeds the § 1988 award on the ground that Mitchell's entitlement to attorney's fees is limited to the § 1988 award, and to order that Venegas' attorneys reduce the amount of their fees to the amount determined to be reasonable and awarded pursuant to § 1988.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JUAN FRANCISCO VENEGAS,
Petitioner,

vs.

MICHAEL R. MITCHELL
Respondent.

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I RICHARD M. MOSK hereby certify that on November 17, 1989, I personally delivered by hand three copies of BRIEF FOR THE PETITIONER to the offices of Michael R. Mitchell, Esq., 4929 Wilshire Boulevard, Suite 910, Los Angeles, California 90010. I further certify that all parties required to be served have been served.

On November 17, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Richard M. Mosk known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same. Subscribed and sworn to me.

Witness my hand and official seal.

S. Darlene Brasington
Notary Public and and for said county and state

OFFICIAL SEAL
S DARLENE BRASINGTON
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires MAR 12, 1993

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a prevailing party can invalidate a fee contract with his attorney on the ground that it obligates him to pay a fee greater than the amount taxed against the losing party under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

2. Whether this Court should set aside the findings of both courts below that the contingent fee contract in this case was reasonable.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following were defendants in the district court at the time of the motion to intervene and were appellees in the court of appeals: Ronnie J. Skaggs and Carthel S. Roberson.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1725

JUAN FRANCISCO VENEGAS,
Petitioner.

v.

MICHAEL R. MITCHELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 867 F.2d at 527. The memorandum decision of the district court (Pet. App. A18-A31) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1989. A petition for rehearing was denied on April 4, 1989. The petition for a writ of certiorari was filed on April 24, 1989, and was granted on October 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, as codified in part of 42 U.S.C. § 1988, provides as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

This case arises out of a civil rights action brought by petitioner in the United States District Court for the Central District of California. Petitioner, represented at trial by respondent and co-counsel, obtained a judgment of more than $2 million in damages against certain police officers under 42 U.S.C. § 1983 for denial of his right to a fair trial. On application for a statutory award of attorney's fees against defendants pursuant to 42 U.S.C. § 1988, the district court awarded petitioner $117,000, of which $75,000 was based on respondent's services. Petitioner has not paid any of this sum to respondent.

After the substitution of other counsel for petitioner, respondent moved for leave to intervene in the district court to confirm a lien on the judgment for $406,000, the amount owed by petitioner pursuant to the contract signed by petitioner and respondent at the outset of the representation. The district court denied the intervention motion, but ruled that the contingent fee contract was reasonable and that respondent was not limited to recovering the amount awarded pursuant to section 1988. The court of appeals held that respondent should have been granted permissive intervention. The court of appeals affirmed the district court's determinations that the contract was reasonable and that respondent's entitlement to fees was not limited to the award under section

1988. Petitioner sought certiorari on the ground that there is a conflict in the circuits on the issue of the interpretation of section 1988. This Court granted the petition.

A. Statement Of Facts

1. *Petitioner's civil rights complaint*

In December 1971, petitioner, Juan Francisco Venegas, was arrested by police officers of the City of Long Beach, California, and charged with murder. He was convicted following a jury trial in July 1972, and sentenced to life imprisonment. In September 1974, the California Supreme Court reversed his conviction on the ground of insufficient evidence, and petitioner was released from custody in October 1974. *People* v. *Reyes*, 12 Cal. 3d 486, 526 P.2d 225, 116 Cal. Rptr. 217 (1974). *See Venegas* v. *Wagner*, 831 F.2d 1514, 1515-1516 (9th Cir. 1987).

Petitioner filed his civil rights complaint against individual members of the Long Beach police department in October 1977.[1] The complaint alleged that defendants had violated 42 U.S.C. § 1983 by conspiring to deny petitioner a fair trial through the knowing presentation of perjured testimony. The district court entered summary judgment in favor of defendants on the ground that the action was barred by the statute of limitations. That judgment was reversed on appeal, and the case was remanded for trial in 1983. *See Venegas v. Wagner*, 704 F.2d 1144 (9th Cir. 1983).

2. *Respondent's representation of petitioner*

In September 1985, petitioner retained respondent, Michael R. Mitchell, an experienced civil rights attorney.[2]

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[1] *See* R. 1, E.R. 1-16. The record is cited by reference to the entry number in the district court docket sheet, with a parallel citation to the Excerpt of Record prepared for use in the court of appeals, a copy of which is being lodged with the Clerk of this Court. The docket sheet is reproduced at E.R. 230-242.

[2] Respondent has represented plaintiffs in numerous civil rights cases, including *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). *See* R. 236, E.R. 69-75. Respondent also was a longstanding mem-

Petitioner and respondent entered into a written contingent retainer contract dated September 18, 1985, which provided that respondent would represent petitioner at trial for a fee of forty percent of any recovery, less a retainer of $10,000 (Br. in Opp. App. A2). The agreement further provided that respondent would apply to the court for attorney's fees and that any award of fees would be applied, "dollar-for-dollar," to offset petitioner's obligation to pay the contingent fee (*id.* at A3).[3] Finally, the agreement stated that it "covers one trial only" and that it did not apply to any further representation "[i]n the event there is a mistrial or an appeal" (*id.* at A1). With petitioner's consent, respondent later obtained the services of Johnnie L. Cochran, Jr., as co-counsel, who would share any contingent fee equally with respondent. *See* Pet. App. A5-A6.

At the time petitioner retained respondent, the trial was scheduled to be held in less than two months.[4] Respondent began preparations and filed a trial brief and other submissions prior to trial, which ultimately was held before Judge Kelleher over the course of two weeks

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ber and Chairman of the California State Bar Committee on Professional Responsibility and Conduct (*id.*), and was Special Counsel to the U.S. House of Representatives Committee on Standards of Official Conduct. *See* H.R. Rep. No. 46, 100th Cong., 1st Sess. II, 2 (1987).

[3] Consistent with the law then prevailing in the Ninth Circuit, the agreement also provided that the right to attorney's fees belonged to the attorney and would not be waived by the client (Br. in Opp. App. A3). This Court's decision in *Evans* v. *Jeff D.*, 475 U.S. 717 (1986), which reversed a judgment of the Ninth Circuit, was not announced until seven months after the fee agreement was signed and two months after the trial in this case.

[4] *See* R. 167, E.R. 237. Petitioner had been represented initially by the lawyer who had handled his earlier state court damage case, and subsequently by another firm before he engaged respondent.

in February 1986.[5] As the court of appeals later noted, the case "turned on the resolution of a 'difficult question of credibility.'" Pet. App. A17, *quoting Venegas* v. *Wagner*, *supra*, 831 F.2d at 1519. The jury returned a verdict in favor of petitioner for $2.12 million, which was reduced on post-trial motions to $2.08 million. Under the contingent fee contract, respondent was entitled to a fee of $406,000. *See* Pet. App. A6, A18.[6]

The damages award obtained for petitioner through respondent's efforts was more than twice the verdict entered in an earlier state court action for false arrest, in which petitioner was represented by other counsel.[7] While the evidence of damages was essentially the same in both cases, trying the federal cause of action for denial of petitioner's right to a fair trial represented "a more formidable task than establishing false arrest." *Venegas* v. *Wagner*, *supra*, 704 F.2d at 1146 n.1. Thus, respond-

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[5] *See* R. 236, E.R. 63-65. Petitioner's contention (Br. 11) that respondent did little work on the case is without foundation. Respondent was required to expend more than 200 hours in preparing and trying the case (R. 236, at 6, E.R. 53; R. 242, at 5, E.R. 133). Discovery was not pursued because the deadline had passed long before respondent was retained; respondent's inability to conduct discovery made the case more difficult, not less. Petitioner's misleading assertion that respondent did not file any "pleadings" is true only because of the technical definition of the term (*see* Fed. R. Civ. P. 7(a)). Contrary to the impression petitioner would leave, however, respondent made numerous court filings, including the trial brief, request for voir dire, request for jury instructions, witness and exhibit lists, and opposition to defendants' motion for judgment notwithstanding the verdict. *See* R. 175, 176, 179, 181, 184, 187, 210, 211, E.R. 238-239. No Rule 7(a) pleadings had been filed by either side since the answer in 1978 (R. 13, E.R. 231).

[6] Respondent's fee represents 20% of $2.08 million (since respondent shared the 40% fee equally with co-counsel), less the $10,000 retainer.

[7] The award of $1 million in that case was reversed on appeal in an unpublished decision. *Venegas* v. *City of Long Beach*, 2d Civ. No. 66285, Cal. App., Second Appellate District, Division Three (Oct. 31, 1983) (copy lodged with the Clerk of this Court).

ent faced a more difficult case in federal court, yet he achieved an award for petitioner that exceeded the state court verdict by more than $1 million.[8]

Pursuant to the fee contract, respondent prepared and filed for petitioner a motion for attorney's fees under section 1988.[9] Following a hearing, the district court awarded fees totalling $117,000, of which $75,000 was for work performed by respondent.[10] Judge Kelleher specifically noted respondent's "exceptionally competent performance" and "the excellent results obtained." [11]

Defendants appealed from the judgment-in-chief and from the award of attorney's fees. Petitioner appealed from the grant of judgment notwithstanding the verdict with respect to one defendant, which reduced the total damages award by $40,000. Respondent offered to represent petitioner on the appeal for a fee of 10 percent of the judgment. In connection with this offer, respondent advised petitioner to seek independent counsel to review the proposal, and he stated that he would be willing to consider a counter-proposal on the terms of the representation. Petitioner obtained such advice, rejected the offer without making a counter-proposal, and obtained new counsel for the appeal.[12]

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[8] Petitioner's argument (Br. 11) that the federal case did not present any risk of nonrecovery in light of the earlier state case ignores the different legal burdens presented by the different causes of action. It also ignores the finding of the court of appeals that there was no showing that the federal action "posed an unusually low risk for a civil rights case." Pet. App. A17. Finally, whatever the risk was, petitioner fails to account for the substantially greater relief obtained through respondent's efforts in the federal action. Even after deducting the contractual fee, petitioner will receive substantially more from the federal case than the jury had awarded in the state case.

[9] R. 236, E.R. 44-115.

[10] R. 242, E.R. 129-136; *see* Pet. App. A6, A18.

[11] R. 242, at 6, E.R. 134; *see* Pet. App. A28.

[12] *See* Pet. App. A29; R. 256, at 14, E.R. 191.

The court of appeals affirmed in all respects. *Venegas* v. *Wagner*, *supra*, 831 F.2d 1514. Petitioner and defendants subsequently entered into a satisfaction of judgment while the case was subject to possible further review.[13]

3. *The motion to intervene*

After other counsel had been substituted for petitioner on appeal, respondent moved for leave to intervene in the district court.[14] The purpose of the motion was to confirm a lien on the judgment to cover the attorney's fees owed by petitioner under the contingent fee contract. Petitioner did not oppose the motion, but argued that respondent's fee was limited to the amount awarded under section 1988.[15]

B. Decisions Below

1. *District court*

Following a hearing, the district court denied respondent's motion to intervene, but held that respondent was

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[13] *See* Satisfaction of Judgment in *Venegas* v. *Wagner*, No. CV 77-4047 RJK (C.D. Cal. filed Mar. 10, 1988) (copy lodged with the Clerk of this Court). Under the agreement, the City of Long Beach is making lump-sum and periodic payments to petitioner with a present value of approximately $2,000,000, plus a payment of $117,000 in attorney's fees awarded under section 1988 "for further distribution" (page 6). Petitioner has not, however, paid any of this sum to respondent. The satisfaction also provides that $800,000 of the total payment will be made into an escrow account, pending resolution of the dispute under the fee contract (page 5). As part of the agreement, petitioner waived punitive damages of $80,000 and accumulated interest of approximately $450,000 (pages 3-4).

[14] Petitioner asserts (Br. 6) that the motion was filed while respondent was still counsel of record. As the district court found, however, the motion was not filed until after respondent "signed a stipulation withdrawing as [petitioner's] counsel of record" (Pet. App. A18). Respondent thus did not file a motion on his own behalf until after the attorney-client relationship with petitioner had terminated.

[15] *See* Pet. App. A7, A18-A19; R. 254, 256, 260, E.R. 137-199.

entitled to the contingent fee established in his contract with petitioner. Pet. App. A18-A31.[16] Judge Kelleher found that respondent's "contingent fee does not constitute a windfall," since it compensates the attorney on a different basis from the calculation under section 1988 (*id.* at A28). Unlike the "lodestar" statutory fee award, "a 'reasonable' contingent fee does more than compensate an attorney for the time reasonably expended on a case. * * * [C]ontingent fee arrangements allow fee-indigent clients to obtain counsel to prosecute their civil rights claims while compensating the attorney for the risk of possible nonrecovery" (*id.*). The district court also noted that petitioner's "rights under section 1988 have not been affected in any way by the contingent fee contract," since that contract "expressly provides that any award of attorney's fees must be offset against [respondent's] contingent fee" (*id.* at A29).

The district court also determined that there was no other basis for invalidating the contract (Pet. App. A28-A29). In particular, the district court rejected petitioner's argument that respondent was obligated under the contract to prosecute the appeal without any additional fee. The district court concluded that the contract by its terms covered only the trial and not an appeal, and it noted that respondent advised petitioner to have independent counsel review his proposal to take the appeal for a fee of an additional ten percent of the judgment. As the district court concluded, "both [respondent] and [petitioner] acted within their rights," and there is "no reason to reduce or eliminate [respondent's] rights under the contingent fee agreement" (*id.* at A29).

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[16] The district court concluded that it had "jurisdiction to determine the rights of the parties under the contingent retainer agreement as ancillary to its conduct of the principal litigation" (Pet. App. A29-A30). While the court declined to exercise that jurisdiction to the extent of confirming a lien, it did exercise its supervisory powers to review the propriety of the contingent fee contract. *See id.* at A27-A28, A30.

2. *Court of appeals*

On cross-appeals, the court of appeals reversed the district court's denial of the motion to intervene and affirmed the ruling that respondent was entitled to collect his full fee under the contract (Pet. App. A1-A17). With respect to intervention, the court of appeals did not hold that an attorney could intervene as of right in these circumstances, but only that the district court "abused its discretion when it denied [respondent] permissive intervention because it chose to address the merits of his contingency fee agreement" (*id.* at A11).

The court of appeals followed its decision in *Hamner* v. *Rios*, 769 F.2d 1404 (9th Cir. 1985), in holding that section 1988 "does not set a ceiling on an attorney's entitlement under a contingent fee contract," but that "a district court must [use its supervisory powers to] review a contingent fee in a civil rights case to ensure that the contingent fee is reasonable" (Pet. App. A12 & n.6). The court of appeals reasoned that "limit[ing] attorneys' entitlements under contingent fee agreements to statutory awards would discourage attorneys from agreeing to represent civil rights plaintiffs," contrary to the basic purpose of section 1988 (*id.* at A13).

In addition, the court of appeals stated that there was a significant need for enforceable contingent fee contracts in view of the limitations on contingency adjustments to section 1988 awards established under this Court's decision in *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987). Pet. App. A14. This need was reinforced by the right of clients to waive section 1988 fees recognized in *Evans* v. *Jeff D.*, 475 U.S. 717 (1986): "If courts must respect the freedom of clients and attorneys to agree that the attorney will receive no § 1988 fee in order to achieve a satisfactory § 1983 settlement, fairness requires that we respect the freedom of clients and attorneys to agree to a contingency fee in excess of a § 1988 award" (Pet. App.

A15). In sum, courts "should provide wide parameters to the negotiations between attorneys and their clients" (*id.*).

Finally, the court of appeals agreed with the district court that the contingency fee agreement in this case is reasonable (Pet. App. A16-A17). As the court of appeals noted, the "contingent fee is reasonable because it reflected the risk of nonrecovery" assumed by the attorney, and there was "no evidence suggesting that a 40% contingent fee is not standard in California for civil rights cases, or that [this] particular case posed an unusually low risk for a civil rights case" (*id.* at A17). The court of appeals therefore held that "a 40% contingent fee is reasonable in this case" (*id.*).

SUMMARY OF ARGUMENT

The primary issue in this case is whether a fee contract between lawyer and client is rendered invalid solely because it results in a fee greater than the amount taxed against the opposing party under 42 U.S.C. § 1988. Petitioner's argument that he is entitled to avoid paying the amount due under his contract with respondent is at odds with the language, legislative history, and policy of section 1988. It would be anomalous to read a statute intended to assist civil rights plaintiffs in obtaining representation instead as foreclosing their ability to retain counsel on a contingency or other contractual basis.

By its terms, section 1988 speaks only to the amount allowed to a prevailing party against a losing party, and not to the enforceability of a voluntary fee agreement between lawyer and client. When Congress has wanted to restrict attorneys to the amount awarded by the court, to preclude contingency contracts, or otherwise to regulate attorney-client fee agreements, it has done so expressly. Congress was aware of such laws when it considered section 1988 and enacted one of them at the same time that the civil rights fees statute was under debate.

Its choice not to include similar restrictions in section 1988 should not be overridden by judicial fiat.

The courts have been virtually unanimous in recognizing that section 1988 does not limit the fee that may be charged under a contingent fee contract. For example, in *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), both the plurality and dissenting opinions accepted the premise that an adjustment in the statutory award for the risk in the particular case is unnecessary where a contingent fee contract exists, since the contract presents the attorney with "the prospect of compensation greater than the prospective lodestar amount." *Id.* at 749 (dissent); *see also id.* at 726 (plurality). Seven of the eight courts of appeals that have addressed the issue have agreed that contingency contracts can provide for fees greater than the statutory award against the losing party. The legislative history confirms that Congress did not intend to invalidate private fee agreements in these circumstances.

Maintaining the enforceability of these contracts is particularly important in view of the client's right to waive fees under *Evans* v. *Jeff D.*, 475 U.S. 717 (1986). While petitioner repeatedly suggests that lawyers should be satisfied with the fee award under section 1988, he ignores *Evans* and later cases holding that the statutory award belongs only to the client and that the attorney has no independent right to obtain fees pursuant to that provision. In fact, petitioner has never paid respondent the amount awarded by the court in this case under section 1988. Unless lawyers and clients are permitted to enter into binding fee agreements, lawyers can have no assurance of being paid for their labors, and civil rights plaintiffs will find it more difficult to obtain counsel—precisely the opposite of what Congress intended when it enacted the law.

Petitioner relies heavily on the argument that the "reasonable" fee awarded by the court under section 1988

renders any greater fee *per se* unreasonable. This argument ignores the different factors considered by the court in taxing an award at the end of the case against a losing party and those considered by a lawyer and client in voluntarily agreeing to a fee at the outset of representation. Moreover, the fact that a court must determine an amount to allow under section 1988 does not authorize it to intrude as a routine matter into the private contracts of lawyers and clients. Such contracts are entitled to respect and should be invalidated only when the fee exceeds what is permissible under the applicable ethical standards. Congress did not regulate legal ethics in section 1988, and the amount of a statutory award does not establish the outer boundary of an ethically proper fee.

Finally, petitioner argues that, even apart from section 1988, the fee contract in this case was unreasonable and should not be enforced. His arguments were rejected by both courts below, and there is no basis for this Court to disturb those findings. The contract was a written contingency agreement that appropriately compensated respondent for the work performed and the risk of loss. The terms of the contract comported in all respects with applicable state law and ethical rules. This Court should not permit petitioner to avoid paying the fee on which respondent relied in rendering services on his behalf, which resulted in a recovery by petitioner of well over $1 million, even after allowing for full payment of the agreed-upon legal fee.

ARGUMENT

I. SECTION 1988 DOES NOT INVALIDATE A LAWYER-CLIENT CONTRACT FOR THE PAYMENT OF FEES GREATER THAN THE AMOUNT TAXED AGAINST THE LOSING PARTY.

A. Section 1988 Does Not Regulate Fee Agreements Between Lawyers And Clients.

Petitioner invokes the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, as a basis for invalidating his fee contract with respondent. Such an application of section 1988 would turn the statute on its head. Congress enacted the law in order to encourage citizens to vindicate their civil rights. Petitioner would instead impute to Congress an intent to overturn accepted private fee arrangements that provide incentives for attorneys to represent clients in cases that involve substantial damages claims. Neither the statutory language nor the legislative history supports such a reading, and it would have a significant adverse effect on the ability of civil rights plaintiffs to obtain representation.

1. *The statutory language does not apply to agreements between clients and their lawyers.*

Section 1988 provides simply that the court in a civil rights case "may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Nothing in this provision speaks to voluntary fee arrangements between clients and their own lawyers. Rather, it provides only that an award may be involuntarily taxed against a losing party.

When Congress has intended to regulate attorney-client fee arrangements, it has done so expressly. For example, at the very time that it was debating Section 1988, Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976. That Act allows attorney's fees in state *parens patriae* actions, but expressly limits

the circumstances under which private attorneys can be retained on a contingent fee basis to bring such suits. 15 U.S.C. §§ 15c(d)(1), 15g(1).[17]

More recently, in the National Childhood Vaccine Injury Act of 1986, Congress provided that an award of compensation under that statute shall include a reasonable attorney's fee. 42 U.S.C. § 300aa-15(e)(1)(A). The statute expressly states in addition that "[n]o attorney may charge any fee for services in connection with a [compensation] petition * * * which is in addition to [the amount awarded by the court]." 42 U.S.C. § 300aa-15(e)(3).

There are several other examples of statutory regulation of fee agreements.[18] Contingent fees are generally prohibited in government contracts. 41 U.S.C. § 254(a); 10 U.S.C. § 2306(b). In the Federal Tort Claims Act, Congress prohibited attorneys from charging a fee of more than 25 percent of the judgment. 28 U.S.C. § 2678.

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[17] *See* Pub. L. No. 94-435, 90 Stat. 1383 (Sept. 30, 1976). Under section 4G of the Clayton Act, as added by the Hart-Scott-Rodino Act, 15 U.S.C. § 15g(1), the definition of "State attorney general" entitled to bring a *parens patriae* action "does not include any person employed or retained" on "a contingency fee based on a percentage of the monetary relief awarded" or on "any other contingency fee basis, unless the amount of the award of a reasonable attorney's fee to a prevailing plaintiff is determined by the court under [the fee-shifting provision]." Repeated references to this prohibition on contingency fees were made during the debate over section 1988. *See, e.g.*, 122 Cong. Rec. 31473, 31487, 31830, 31850 (1976) (remarks of Sen. Allen).

[18] Currently before the Court is the constitutionality of the attorney's fee provisions of the Black Lung Benefits Act and implementing regulations, which require judicial or administrative approval of attorney's fees and also provide that "[n]o contract or prior agreement for a fee shall be valid." 20 C.F.R. § 725.365; 30 U.S.C. § 932(a); 33 U.S.C. § 928(c). *See United States Dep't of Labor* v. *Triplett*, No. 88-1671; *Committee on Legal Ethics* v. *Triplett*, No. 88-1688. The cases have been consolidated and are scheduled for argument on January 16, 1990.

Similarly, Congress formerly limited to $10 the fee that may be charged by an attorney in a veteran's benefits proceeding. *See Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985). The law was amended in 1988 to limit fees to no more than 20 percent of the total award and to permit the Board of Veterans' Appeals to order reductions in fees that it finds excessive or unreasonable. 38 U.S.C. § 3404(c) and (d), as added by Pub. L. No. 100-687, 102 Stat. 4105, 4108 (Nov. 18, 1988). Many other laws directly regulating attorney's fees were cited and discussed in materials submitted during the 1975 House hearings leading up to the enactment of section 1988.[19]

In short, when Congress wished to regulate private attorney-client fee arrangements, "it knew how to do so." *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987) (expert witness fees). There is no reason that Congress could not have done so in section 1988 as well, and the issue was raised during the debates on the law (*see* notes 17 and 19, *supra*), yet Congress included no such provision. This Court should not add a prohibition to section 1988 that Congress itself did not put in the statute. *See, e.g., Northbrook National Life Ins. Co.* v. *Brewer*, 58 U.S.L.W. 4003, 4005 (Nov. 7, 1989) (refusing "to assume that Congress intended anything more than it had stated in unambiguous terms," particularly where "Congress could easily have used language" to accomplish a result, yet did not do so).

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[19] *See Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 304-306 (1975) (ABA report) [*House Hearings*]. In fact, members of the House considered during the hearings whether to "prohibit contingent fees" in the context of condemnation cases because there is not in those cases the risk of "collecting nothing" that is "the justification for the contingent fee." *Id.* at 116 (remarks of Rep. Pattison).

Thus, while the interpretation of section 1988 may be unclear with respect to some questions, this is not one of them. The statute addresses the allowance of fees against losing parties, not the fee agreements between lawyer and client. Several decisions of this Court are premised on precisely this understanding of the law. *See, e.g., Blanchard* v. *Bergeron*, 109 S. Ct. 939 (1989) (fee award not limited by prevailing party's contingent fee contract); *Blum* v. *Stenson*, 465 U.S. 886 (1984) (fee award not limited where prevailing party represented by organization that did not charge fees to clients). There is no basis for departing from that understanding here.

Eight Members of the Court have recognized that section 1988 does not preclude the payment of a contingent fee in an amount greater than the fee taxed against the losing party. In *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), both the plurality and the dissent agreed that enhancement of the statutory lodestar award for the risk of losing in the particular case is unnecessary when the attorney and prevailing party have a contingent fee contract that gives the attorney "the prospect of compensation greater than the prospective lodestar amount." *Id.* at 749 (Blackmun, J., dissenting); *see also id.* at 726 (contingency adjustment in lodestar unnecessary "where any plaintiff, impecunious or otherwise, has a damages case that competent lawyers would take in the absence of fee-shifting statutes," since the damages would be "sufficient to provide adequate compensation to counsel") (plurality op.).[20] It would be inconsistent with the premises underlying these *Delaware Valley* opinions for the Court now to hold

[20] *See also id.* at 720-721 n.6, where the Court cited *McKinnon* v. *Berwyn*, 750 F.2d 1383 (7th Cir. 1984), for the proposition that a contingency adjustment is not necessary "in cases where the attorney has entered into a contingent-fee contract with his client," since "the attorney is already being compensated for the risk of loss."

that contingent fee contracts are unenforceable to the extent that they exceed an award under section 1988.[21]

The lower courts are virtually unanimous that contingent fee contracts are not rendered invalid merely because the amount of the fee agreed to by the client is greater than the award taxed against a losing party under section 1988. *See Lewis* v. *Coughlin*, 801 F.2d 570, 576 (2d Cir. 1986);[22] *Sullivan* v. *Crown Paper Board Co.*, 719 F.2d 667, 670 (3d Cir. 1983); *Kirchoff* v. *Flynn*, 786 F.2d 320, 323 n.4 (7th Cir. 1986); *Wilmington* v. *J.I. Case Co.*, 793 F.2d 909, 923 (8th Cir. 1986); *Hamner* v. *Rios*, 769 F.2d 1404, 1409 (9th Cir. 1985); *see also Sargeant* v. *Sharp*, 579 F.2d 645, 648 & n.4 (1st Cir. 1978); *Pharr* v. *Housing Authority*, 704 F.2d 1216 (11th Cir. 1983).[23] In their treatise on professional re-

[21] While *Delaware Valley* concerned attorney's fees under the Clean Air Act, the Court applied the principles governing awards under section 1988. *See* 483 U.S. at 713 n.1.

[22] In *Lewis* v. *Coughlin*, the Second Circuit clarified its statement in *Wheatley* v. *Ford*, 679 F.2d 1037, 1041 (2d Cir. 1982), that a contingent fee contract is satisfied "to the extent counsel receives payment of the section 1988 statutory award." *Lewis* makes clear that the section 1988 award does not discharge the fee contract in its entirety. Rather, *Wheatley* stands only for the proposition that "to the degree that counsel obtains § 1988 payment, that amount should be offset against his claim for services provided under the contingency fee arrangement." 801 F.2d at 576. Moreover, the court in *Wheatley* could not have intended to hold that contingent fee contracts are limited to the amount of a section 1988 award, since the contingent fee recovery in that case ($10,000) was less, not more, than the section 1988 award ($29,742). Like the opinions in *Delaware Valley*, the court of appeals' decision in *Lewis* concludes that a contingent fee contract "is a strong factor militating against a bonus award [under section 1988] as the percentage arrangement in any such agreement takes into account the possibility of losing the case." *Id.*

[23] The only exception is *Cooper* v. *Singer*, 719 F.2d 1496 (10th Cir. 1983) (en banc), which is based on the erroneous pre-*Delaware Valley* view that it is appropriate to adjust the section 1988 lode-

sponsibility, Professors Hazard and Hodes also agree that "the statutory award simply augments plaintiffs' damages, and * * * the contingent fee agreement applies to the recovery according to the agreement's terms." 1 Hazard & Hodes, *The Law of Lawyering* 72.6-1 - 72.7 (Supp. 1989). This consensus of the courts and commentators is hardly surprising in view of the statutory language as well as the legislative history, which is discussed below.

2. *The legislative history confirms that Congress did not intend to invalidate private fee agreements.*

Congress enacted section 1988 to encourage persons to enforce their civil rights by ensuring that lawyers would be available to represent them in court. *See, e.g., Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983); S. Rep. No. 1011, 94th Cong., 2d Sess. 2, 6 (1976) ["Senate Report"]; H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1, 9 (1976) ["House Report"]; Berger, "Court Awarded Attorneys' Fees: What Is 'Reasonable'?," 126 U. Pa. L. Rev. 281, 306 (1977). There is nothing in the legislative history suggesting that Congress, in the course of expanding the opportunities of plaintiffs to obtain representation, intended to restrict the means previously available for attracting counsel. The contingent fee contract provides a desirable

star by taking into account the risk of losing in the particular case. *See id.* at 1501 n.8, 1503 n.12. Subsequently, in the course of holding that *Cooper* applied prospectively only, the Tenth Circuit noted that *Cooper* was intended simply to prevent the windfall that would occur if an attorney were permitted to recover both the section 1988 award and the amount due under a contingent fee contract. *Sears* v. *Atchison, T. & S.F. Ry.*, 779 F.2d 1450, 1453 (10th Cir. 1985). That concern is inapplicable here, where the contract expressly provided that any fee awarded by the court would offset the client's obligation "dollar-for-dollar" (Br. in Opp. App. A3). Moreover, the court in *Sears* acknowledged that *Cooper* is "the *only* opinion holding that a fee shifting award" establishes the maximum allowable fee under a contingency contract and that "[o]ther circuit court opinions have held *contra* to *Cooper*." 779 F.2d at 1453, 1454 (emphasis in original).

additional incentive for counsel to take on meritorious litigation. *See* Leubsdorf, "The Contingency Factor in Attorney Fee Awards," 90 Yale L.J. 473, 495-496 (1981).[24] There is no basis for assuming that Congress intended, *sub silentio*, to abolish this incentive in a statute intended to promote the enforcement of civil rights laws. *See generally, e.g., Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631 (1973) (courts should not " 'impute to Congress a purpose to paralyze with one hand what it sought to promote with the other' ") (citation omitted).

The legislative history characterizes section 1988 as a "limited and cautious" "first step" that "does not overturn [existing] law or practice." 122 Cong. Rec. 35126 (1976) (remarks of Rep. Kastenmeier).[25] Rather, Congress simply provided the express statutory authorization for fee-shifting that this Court had held was required in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). *See* Senate Report, *supra*, at 1; House Report, *supra*, at 2. In enacting section 1988, Congress legislated against a backdrop of existing fee-shifting statutes that authorized attorneys and clients to enter into contingent fee contracts, as well as the existing ethical canons authorizing such contracts.[26] At no point in the

[24] At the same time, a contingent fee contract does not encourage frivolous cases, since the attorney is compensated only in the event of recovery. As Professor Leubsdorf observed, an attorney-client fee contract separate from the court fee award promotes informed litigation decisionmaking in light of all of the relevant costs and benefits. *See* 90 Yale L.J. at 507.

[25] Representative Kastenmeier was chairman of the subcommittee that held hearings on the fee-shifting bills leading to the enactment of section 1988.

[26] *See, e.g.*, 15 U.S.C. § 15 (Clayton Act); *Pitchford* v. *Pepi, Inc.*, 531 F.2d 92, 111 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976) (if fee award under Clayton Act is less than amount in contingent fee contract, "the unsatisfied portion of the contingency fee could then be paid out of the award for damages"); 122 Cong. Rec. 32389

debates did anyone suggest that section 1988 would upset this settled law. To the contrary, section 1988 was intended to be consistent with existing law.[27] In response to a question from Representative Kastenmeier during the 1975 hearings on fee-shifting bills, Representative Seiberling, a leader in the drive for fee-shifting legislation, stated that the proposed legislation "certainly is not going to make attorneys' fees any less."[28] It would be inconsistent with this understanding to interpret section 1988 to reduce the fees that attorneys were previously entitled to collect under contracts with their clients.

In fact, Congress was not directly concerned with cases such as this one that could generate sufficiently large damages awards to provide for compensation to counsel. Rather, as Senator Tunney explained in introducing the bill, in "the typical case * * * there is often no damage claim from which an attorney could draw his fee." 121 Cong. Rec. 26806 (1975). The concern with cases for declaratory and injunctive relief and cases involving only

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(1976) (quoting law review article explaining that "[t]he great majority of plaintiffs' attorneys in antitrust suits have private fee arrangements with their clients" and that the court award "is merely a factor in these arrangements"); Model Code of Professional Responsibility, DR 2-106(B)(8).

[27] *See, e.g.*, Senate Report, *supra*, at 6; House Report, *supra*, at 5-9; 122 Cong. Rec. 31472 (1976) (remarks of Sen. Kennedy); *id.* at 35116 (remarks of Rep. Drinan, floor manager in the House); *id.* at 35117 (remarks of Rep. Railsback). In *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), the court of appeals noted that a fixed or contingent fee contract may be for an amount greater than the fee award entered by a court. *Id.* at 718, *quoting Clark* v. *American Marine Corp.*, 320 F. Supp. 709, 711 (E.D. La. 1970), *aff'd on opinion below*, 437 F.2d 959 (5th Cir. 1971). This Court has often observed that *Johnson* provides guidance with respect to Congress's intent in section 1988. *See, e.g., Hensley* v. *Eckerhart*, *supra*, 461 U.S. at 429-430, 434 n.9; *Blanchard* v. *Bergeron*, *supra*, 109 S. Ct. at 943. *See also* Senate Report, *supra*, at 6; House Report, *supra*, at 8.

[28] *House Hearings*, *supra*, at 1, 49.

small damage claims is evident throughout the legislative history.[29] As Senator Kennedy concluded, often "civil rights cases * * * do not provide the prevailing plaintiff with a large recovery from which he can pay his lawyer." 122 Cong. Rec. 33314 (1976). *See also, e.g., City of Riverside* v. *Rivera*, 477 U.S. 561, 577 (1986) (plurality op.). Similarly, in the House hearings, Representative Seiberling made clear that the legislation "does not make much difference" in cases involving "a great monetary stake."[30]

Petitioner's reliance on the legislative history indicating that section 1988 will not provide a "windfall" for lawyers is misplaced. The payment of an otherwise permissible contingency fee is not a windfall but an accepted and ethically proper form of compensation. There is no double compensation, since any award under section 1988,

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[29] *See, e.g.*, Senate Report, *supra*, at 6 (civil rights "may be nonpecuniary in nature"); House Report, *supra*, at 9 (in most civil rights cases "only injunctive relief is sought," and immunity doctrines and other defenses "preclude or severely limit the damage remedy"); 122 Cong. Rec. 31832 (1976) (remarks of Sen. Hathaway); *id.* at 35118 (remarks of Rep. Seiberling); *id.* at 35126 (remarks of Rep. Kastenmeier).

[30] *House Hearings*, *supra*, at 50. The isolated statements in the legislative history relied on by petitioner to the effect that the bill would allow plaintiffs to recover their costs must be understood in the context of cases seeking injunctive relief or small amounts in damages. Providing adequate redress for plaintiffs in such cases was undoubtedly the chief concern underlying section 1988. By the same token, however, nothing in the legislative history suggests that fee-shifting was intended to excuse plaintiffs with large monetary claims from paying their attorneys an agreed-on fee out of the damages judgment. *Compare* H.R. Rep. No. 908, 99th Cong., 2d Sess., Part I, at 22 (1986) (under the vaccine compensation statute, "[n]o attorney may charge a fee for services in connection with a petition other than the amount" awarded by the court). In fact, the legislative history of section 1988 quotes a law review article stating that, in large damages cases, "a private fee arrangement with the client" may be "added to the court-awarded attorney's fees" to "assure[] adequate compensation for the attorney." 122 Cong. Rec. 32391 (1976).

to the extent made available to the attorney, is applied to offset the fee obligation under a contingency contract. The only person who benefits is the client. The windfall in this case would accrue to petitioner if the contract is invalidated, since he would then receive the benefit of the $2 million judgment that respondent achieved, without paying the fee that he had promised and on which respondent relied.

Petitioner thus would subvert Congress's intent to assist plaintiffs in obtaining representation by interpreting section 1988 to limit, rather than expand, the options of civil rights plaintiffs and their attorneys.[31] The legislative history confirms what is clear from the statutory language: Congress did not intend to invalidate private fee agreements when it gave prevailing parties the additional remedy of a fee recovery from losing parties.

Finally, petitioner's argument cannot be limited to contingent fee contracts in civil rights cases. His position also would lead to the invalidation of fixed retainers and hourly fee charges whenever those fees exceeded a statutory award.[32] Nor could this be confined only to civil rights litigation. Private fee contracts in many other settings where fee-shifting statutes are applicable, such as in antitrust cases and other commercial contexts, also would be nullified. There is no indication that Congress intended such an extraordinary limitation on the contractual rights of private parties.

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[31] Such an interpretation would be particularly ironic because the fee-shifting statute is intended to place civil rights plaintiffs on an equal footing with other litigants, not to deny them options available to others. *See, e.g., House Hearings, supra,* at 89-90 (submission of Ms. Derfner on behalf of the Lawyers' Committee for Civil Rights).

[32] In addition, lawyers for prevailing defendants presumably would be limited to the amount of any fee award under section 1988 in those cases where fees are taxed against the plaintiff because a lawsuit was frivolous or brought for an improper purpose. *See, e.g., Hensley* v. *Eckerhart, supra,* 461 U.S. at 429 n.2.

3. *Invalidating fee contracts would make it more difficult for clients to obtain representation in civil rights cases.*

A fundamental premise of petitioner's brief is that attorney-client fee contracts should be unenforceable because the attorney will be paid an award under section 1988. The precedents and facts of this case demonstrate that this premise is erroneous. The right to an award under section 1988 rests with and may be waived by the client. Any award that is entered is made to the client, not the attorney. Without an enforceable fee contract, the attorney is assured of nothing. In this very case, petitioner has not paid respondent any of the $75,000 awarded under section 1988 for his services.

Without some assurance of fees, the civil rights bar will simply be unable to represent plaintiffs in these actions. Plaintiffs with substantial monetary claims, who would have been able to obtain representation on a contingent fee basis before section 1988 was enacted, will find themselves worse off than before.

In *Evans* v. *Jeff D.*, 475 U.S. 717 (1986), this Court held that the entitlement to a fee award under section 1988 rests with the prevailing party, not the attorney, and that the statute does not prohibit the prevailing party from waiving that entitlement. The lower courts have extended *Evans* from the class-action context in which it arose to individual actions as well. For example, in *Willard* v. *City of Los Angeles*, 803 F.2d 526 (9th Cir. 1986), plaintiffs (represented by respondent) waived attorney's fees as part of a $10,000 settlement. The court of appeals held that the attorney was not entitled to intervene following the settlement or to apply on his own behalf for an award of fees under section 1988. *See also Panola Land Buying Ass'n* v. *Clark*, 844 F.2d 1506 (11th Cir. 1988) (Equal Access to Justice Act); *Soliman* v. *Ebasco Services Inc.*, 822 F.2d 320 (2d Cir. 1987), *cert. denied*, 484 U.S. 1020 (1988) (Title VII); Note, "Fee as the

Wind Blows: Waivers of Attorney's Fees in Individual Civil Rights Actions Since *Evans V. Jeff D.*," 102 Harv. L. Rev. 1278 (1989) ["Fee Waivers"]. The record in this case reflects the common practice of civil rights defendants to require fee waivers as a condition of settlement.[33] *See also Mitchell* v. *City of Los Angeles*, 741 F.2d 281 (9th Cir. 1984), *amended*, 753 F.2d 86 (9th Cir. 1985).

In the face of fee waivers, enforceable fee contracts offer attorneys their only assurance that civil rights representation will be economically feasible. *See* Hazard & Hodes, *The Law of Lawyering*, *supra*, at 72.9-72.10 ("it is perfectly proper for a lawyer to negotiate with a client in advance for a reasonable fee, to insist upon being paid that fee, and to let the client accept or reject the defendant's offer [to settle with a waiver of statutory fees] accordingly"); *Soliman*, *supra*, 822 F.2d at 322-323 (whether statutory awards "ultimately end up in the lawyer's or the client's hands depends, of course, on the private fee arrangements entered into between them when representation is undertaken"); Fee Waivers, *supra*, 102 Harv. L. Rev. at 1288 (waiver is implicit in lump sum settlement unless lawyer and client have contingent fee or retainer agreement).[34] To be sure, contingent fee arrangements have no application in many civil rights cases,

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[33] *See* R. 256, at 17-20, E.R. 194-197. *Evans* is, in effect, self-executing, and court approval of the waiver is not required outside of the class action context where settlements must be approved under Rule 23. When presented with a settlement offer including a fee waiver, a lawyer's ethical obligation is to advise the client to act in the client's best interests.

[34] This case does not present the question whether "civil rights attorneys can obtain agreements from their clients not to waive attorney's fees." *Evans* v. *Jeff D.*, *supra*, 475 U.S. at 766 (Brennan, J., dissenting). Rather, the issue is only whether a fee agreement (which provided also that fees would be sought under section 1988) is invalidated by section 1988.

where plaintiffs seek only declaratory and injunctive relief or small amounts in damages. That is no reason, however, to invalidate them in those cases where they can usefully be employed. It would be unreasonable to assume that Congress, in the course of addressing inadequacies in the representation of civil rights plaintiffs with small or no damages claims, would have made it more difficult for plaintiffs with larger claims to obtain representation.

B. The Amount Taxed Against A Losing Party Under Section 1988 Does Not Establish The Maximum Fee That A Lawyer May Ethically Charge A Client Under Their Contract.

Although there is no language in section 1988 directly regulating attorney-client fee agreements, petitioner argues that any fee greater than an award under section 1988 is *per se* unreasonable and may not be collected. This argument is without merit. A reasonable fee taxed against a losing party under section 1988 at the end of a case is based on different factors from those that a lawyer and client may voluntarily take into account at the outset of representation. As the Third Circuit has stated, "courts should be loathe to intrude into a contractual relationship between an attorney and client, and * * * a comparison between the contractual fee and the *Lindy* [lodestar] fee, whose method of calculation is designed to meet very different needs, is an inappropriate ground for invalidation of a contingent fee arrangement."[35] Similarly, Professors Hazard and Hodes state:

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[35] *Dunn* v. *H.K. Porter Co.*, 602 F.2d 1105, 1112 (3d Cir. 1979). The *Lindy* fee is the lodestar amount established pursuant to *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), and 540 F.2d 102 (3d Cir. 1976). While the lodestar calculation under section 1988 differs in some respects from the *Lindy* lodestar, the difference only confirms that the fee award under section 1988 is based on considerations that are not relevant to the fee agreement between lawyer and client. Under *Lindy*, a court could take into account the prelitiga-

> The lodestar * * * provides a formula for establishing the liability of the *defendant*, and is not a regulation of the reasonableness of the overall fee charged by the plaintiff's lawyer.
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> * * * *
>
> [T[he term "reasonable" as used in Model Rule 1.5, or its predecessor DR 2-106, does not necessarily have the same meaning as it does in a statutory provision for awarding "reasonable" fees. When a court assesses a "reasonable fee" against the defendant and turns that amount over to the plaintiff, it is exercising an adjudicatory function, and must take into account a whole range of policies * * *. [T]he defendant is willy-nilly forced to "hire" the plaintiff's lawyer (after the fact) at roughly market rates * * *.
>
> In contrast, the term "reasonable" in Rule 1.5 * * * is invoked to determine whether the actual lawyer-client fee contract may properly be enforced.

Hazard & Hodes, *The Law of Lawyering*, *supra*, at 72.5, 72.7-72.8 (emphasis in original). *See also Boston & Maine Corp.* v. *Sheehan, Phinney, Bass & Green, P.A.*, 778 F.2d 890, 894-895 (1st Cir. 1985) ("the lodestar * * * is not the sole benchmark for measuring the reasonableness of any and all attorney fees").

Section 1988 and attorney-client fee contracts have different purposes and are based on different considerations. In the first place, the statute measures a prevailing party's entitlement to recover from a losing party, rather than a voluntarily agreed-on entitlement of a lawyer to recover from his client. *See, e.g., Kirchoff* v. *Flynn*, 786 F.2d 320, 323 (7th Cir. 1986). Thus, for example, courts have held in antitrust cases that "[o]ne factor not conclusive [in determining the reasonableness of a contingent fee] is that the contingency fee agreement —formulated to satisfy needs other than those contemplated by 15 U.S.C. § 15—exceeds the section 15 award." *International Travel Arrangers, Inc.* v. *Western Airlines, Inc.*, F.2d 1255, 1277-1278 (8th Cir.), *cert. denied*, 449 U.S. 1063 (1980). *Accord, Farmington Dowel Products Co.* v. *Forster Manufacturing Co.*, 421 F.2d 61, 88, *later appeal*, 436 F.2d 699 (1st Cir. 1970).

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tion likelihood of success in the particular case. *See* 540 F.2d at 117. This is not permissible under section 1988, but it is relevant to the lawyer-client fee agreement.

Moreover, contingency calculations that are entirely permissible in fee contracts are sharply limited and of a very different nature in statutory fee awards. *See Delaware Valley*, *supra*, 483 U.S. 711. Contingent fee contracts, unlike statutory awards, take into account the risk of losing in the particular case, viewed at the outset of the representation. *See, e.g., Brobeck, Phleger & Harrison* v. *Telex Corp.*, 602 F.2d 866 (9th Cir.), *cert. denied*, 444 U.S. 981 (1979). Statutory awards are based on the time reasonably expanded on the case, viewed at its conclusion; any adjustment for contingency cannot take into account the *ex ante* risk in the particular case. *See id.* at 731 (O'Connor, J., concurring in part and concurring in the judgment). Statutory awards are not modeled on contingent fee contracts (*see Blanchard* v. *Bergeron*, *supra*, 109 S. Ct. at 945), and there is accordingly no reason to assume that what is "reasonable" for one will be "reasonable" for the other. *See, e.g., City of Riverside* v. *Rivera*, *supra*, 477 U.S. at 574 (plurality op.); *id.* at 586 (Powell, J., concurring in the judgement); Leubsdorf, *supra*, 90 Yale L.J. at 481.

In sum, a fee-shifting statute does not involve "simply assigning a client's obligation for fees to others. * * * What constitutes a reasonable fee [award under the statute] may be more or less than the client is obligated to pay the attorney." Berger, *supra*, 126 U. Pa. L. Rev. at 282. *See also, e.g., Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 719 (5th Cir. 1974) (lawyer-client contract not decisive in determining fee award against defendant). This Court has reached the same conclusion in holding that a statutory award is appro-

priate even if the prevailing party's counsel did not charge a fee and that such an award can exceed the amount in the lawyer-client contract. *See Blum* v. *Stenson*, *supra*, 465 U.S. 886; *Blanchard* v. *Bergeron*, *supra*, 109 S. Ct. 939.[36]

Wholly apart from these concerns, courts have held that it would be an "unwarranted interference with a private contract" to invalidate a voluntary agreement for a fee greater than the section 1988 award. *Wilmington* v. *J.I. Case Co.*, 793 F.2d 909, 923 (8th Cir. 1986). *See also Hamner* v. *Rios*, 769 F.2d 1404, 1409 (9th Cir. 1985); *Sargeant* v. *Sharp*, 579 F.2d 645, 648 (1st Cir. 1978). The attorney-client contract "represents their notion of what constitutes a reasonable fee." *Pharr* v. *Housing Authority*, 704 F.2d 1216, 1218 (11th Cir. 1983).[37] Such

[36] Petitioner relies on *Blanchard* to argue that, since the plaintiff can obtain a larger award pursuant to section 1988 than the fee agreed on in a contingency contract, the lawyer should not be able to collect a larger fee under the contract than is awarded under section 1988. This is a *non sequitur*. The point of *Blanchard* is that statutory awards and attorney-client fee contracts are independent, not that the contracts are unenforceable. There is no unfairness in holding a client to his contract, particularly since the right to statutory fees can be waived, which would otherwise leave the lawyer with nothing. *See* Hazard & Hodes, *The Law of Lawyering*, *supra*, at 72.5 (emphasis in original):

> Thus, if the court awarded fee is *lower* [than the contract fee], the plaintiff should *not* be able to force the lawyer to reduce the fee, but should be required to pay the difference. This is really *Blanchard v. Bergeron* in reverse: just as the contract cannot control the statutory award, the statutory fee is not a ceiling on a contingent fee agreement.

See also Dunn v. *H.K. Porter Co.*, *supra*, 602 F.2d at 1111 (it is not unfair to require a client to "honor[] the express terms of the fee agreement," but it would be unfair not to allow the attorney the fee that he bargained for and relied on in providing legal services to the client).

[37] *See* Hazard & Hodes, *supra*, *The Law of Lawyering*, at 72.7 (By enforcing contingent fee agreements for amounts greater than statutory awards, courts permit lawyers "to negotiate for sufficiently

a contract, "if freely made, is not lightly set aside." *Farmington Dowel*, *supra*, 421 F.2d at 90.[38] Petitioner's theory "would require invalidating contingent fee contracts as per se unreasonable whenever damage awards reach large amounts." *Dunn* v. *H.K. Porter Co.*, 602 F.2d 1105, 1112 (3d Cir. 1979). *See generally Boston & Maine Corp.*, *supra*, 778 F.2d at 898 (refusing to invalidate allowance of fees in bankruptcy proceeding simply because the contingency fee "looks high *in hindsight*") (emphasis in original).[39]

For these reasons, a contingent fee contract is not rendered unenforceable merely because it exceeds an award under section 1988. Courts have the power to supervise contingent fees and to limit the amount received to what is permissible under the applicable rules of ethics. Thus, "if the court finds that an agreement

high percentages to protect themselves against the contingency of not prevailing. Since that contingency is what drove both the lawyer and client to proceed on a contingent fee basis in the first place, each should enjoy whatever benefits came from their bargain. If a court tries to superimpose its calculation of what is fair as between plaintiff and plaintiff's lawyer, it would undermine their allocation of risk."). This reasoning is particularly compelling in this case, where respondent, retained by petitioner on a contingency basis, obtained a much more favorable damage award in the federal trial than petitioner's earlier lawyers had been able to obtain in the state trial court.

[38] The Court has in other contexts also recognized that it should not lightly permit a party to a contract "to repudiate its solemn promise." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (enforcing contractual arbitration clause). *See also, e.g., Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (noting "strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions").

[39] Even viewed *ex post*, it certainly is "reasonable" for petitioner to pay respondent the agreed-on fee, since his net recovery is still greater than the full amount of the damages awarded by the jury in the earlier state court action in which he was represented by other counsel.

provides for an unethically excessive fee, it may sparingly exercise its supervisory powers over the bar to limit the amount the attorney may actually receive." *Sargeant* v. *Sharp*, *supra*, 579 F.2d at 648.

The section 1988 award, however, does not establish the maximum ethically permissible fee—that is a question of local standards of professional ethics. *See generally Evans* v. *Jeff D.*, *supra*, 475 U.S. at 766 n.20 (Brennan, J., dissenting) ("Congress has not sought to regulate ethical concerns either in the Fees Act of elsewhere"); *Nix* v. *Whiteside*, 475 U.S. 157, 176 (1986) (Brennan, J., concurring in the judgment) (Court does not "enjoy any statutory grant of jurisdiction over legal ethics").[40] Accordingly, use of the courts' supervisory power to invalidate a contingent fee contract is "not a part of the normal process of awarding fees." *Sargeant* v. *Sharp*, *supra*, 579 F.2d at 648 n.4. Rather, that power should be exercised only in "exceptional circumstances" when the contractual fee is beyond "the outer limit of reasonableness." *Farmington Dowel*, *supra*, 421 F.2d at 90. *Accord*, *International Travel Arrangers*, *Inc.* v. *Western Airlines*, *Inc.*, *supra*, 623 F.2d at 1277-1278. As we show below, the fee in this case falls well within that limit.

[40] The Court should be particularly reluctant to displace state law in this area, since legal ethics has traditionally been a matter of pervasive state regulation. *See Bates* v. *State Bar*, 433 U.S. 350, 361 (1977). Section 1988 does not provide any indication of congressional intent to preempt state regulation of professional ethics, much less the clearly expressed statement of such intent that would be required. *See generally, e.g., Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985).

II. THERE IS NO BASIS FOR THIS COURT TO OVERTURN THE DETERMINATION BY BOTH COURTS BELOW THAT THE CONTINGENT FEE CONTRACT IN THIS CASE IS REASONABLE.

Petitioner argues that, as a factual matter, the contingent fee contract in this case was unreasonable even if section 1988 does not impose a *per se* limit on what may be recovered. This argument, which rests largely on state law, was rejected by both courts below. *See* Pet. App. A16-A17, A28-A29. There are no exceptional circumstances that would warrant this Court in overturning the concurrent findings of the district court and court of appeals. *See generally, e.g., Frisby* v. *Schultz*, 108 S. Ct. 2495, 2500-2501 (1988); *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

Petitioner's contention that the 40 percent fee is "manifestly oppressive" (Br. 34) is erroneous. The court of appeals agreed with the district court that the fee "reflected the risk of nonrecovery." Pet. App. A17. The validity of contingent fees under California law is well-settled, and the contract in this case complied in all respects with that governing state law. *See* California Rules of Professional Conduct 4-200 and former rule 2-107; Cal. Bus. & Prof. Code § 6147(a)(3); 1 Witkin, *California Procedure*, "Attorneys," §§ 149 *et seq.* (3d ed. 1985). *See also Delaware Valley*, *supra*, 483 U.S. at 735-736 (Blackmun, J., dissenting) (describing professional consensus that contingency premium in private fee contracts is permissible).

The court of appeals observed in particular that petitioner had failed to present any evidence that a 40 percent fee "is not standard in California for civil rights cases." Pet. App. A17.[41] The district court agreed, concluding that "[respondent's] contingent fee does not constitute a windfall." *Id.* at A28. Similarly, the Long

[41] *See also* R. 260, at 12, E.R. 148 (declaration of respondent).

Beach City Attorney stated in opposition to the award of fees under section 1988 that contingent fee agreements "generally provide 25% to 40% of the award as compensation for the prevailing attorneys."[42] These conclusions are buttressed by other reported cases involving contingent fees of 40 percent and more in civil rights cases. *See, e.g., Hernandez* v. *Hill Country Telephone Cooperative, Inc.*, 849 F.2d 139, 144 (5th Cir. 1988); *Elmore* v. *Shuler*, 787 F.2d 601 (D.C. Cir. 1986); *Sisco* v. *J.S. Alberici Constr. Co.*, 733 F.2d 55 (8th Cir. 1984); *Taylor* v. *Franklin Drapery Co.*, 443 F. Supp. 795 (W.D. Mo. 1978). *See also Phillips* v. *Smalley Maintenance Services, Inc.*, 711 F.2d 1524 (11th Cir. 1983) (40 percent fee for state law claims pendent to Title VII claim); *see generally, e.g., Novinger* v. *E.I. DuPont de Nemours & Co.*, 809 F.2d 212 (3d Cir.), *cert. denied*, 481 U.S. 1069 (1987) (40 percent fee in product liability action).

Similarly misguided is petitioner's argument that the contract should be set aside because respondent did not agree to handle the appeal without additional compensation. The written retainer agreement expressly provided that it was for "one trial only" and that there was no obligation to agree on further terms for representation "[i]n the event there is a mistrial or an appeal" (Br. in Opp. App. A1). The district court found no basis for disregarding the terms of the contract. *See* Pet. App. A29.[43] Respondent was accordingly well within his rights

[42] R. 238, at 4, E.R. 119.

[43] *Dalzell* v. *State Bar*, 6 Cal. 2d 433, 57 P.2d 1300 (1936), on which petitioner relies (Br. 37), has nothing to do with whether an attorney is obligated to represent his client on appeal notwithstanding the express terms of the retainer. "No appeal was taken" in that case (57 P.2d at 1301). Rather, the attorney in *Dalzell* "had charged and collected fees in excess of those authorized by the contract of employment and had failed over a period of years to account for the amounts collected or disbursements made by him on behalf of his clients and * * * had improperly appropriated a substantial portion of such collections to his own use in the guise of fees" (*id.* at 1302). Petitioner's reliance (Br. 35-36) on 1 Speiser, *Attorney's Fees* (1973), also is misplaced. The treatise makes clear that a retainer is deemed to include services on appeal without additional compensation only if it is silent on the matter. Here, in contrast, the contract expressly addresses the issue.

in proposing to take on the appeal for an additional ten percent of the judgment, and he took the extra step of asking petitioner to seek review of the proposal by independent counsel, which petitioner did.[44]

Since the contract covered only services at trial, petitioner's argument (Br. 37) that he "discharged" respondent is erroneous, and his reliance on *Fracasse* v. *Brent*, 6 Cal. 3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (1972), is misplaced. The rule in *Fracasse*—that a discharged attorney can recover only the reasonable value of his services and not the amount in a contingent fee contract—has no application where, as here, the contract was fully performed. In fact, the court in *Fracasse* made clear that an attorney is entitled to his full contingent fee if he is discharged " 'on the courthouse steps' " and then "the client executes a settlement obtained after much work by the attorney." *Id.*, 494 P.2d at 14. Here, of course, the attorney-client relationship ceased *after* a favorable judgment was obtained, making the case for enforcement of the contract even stronger than what was contemplated in *Fracasse*.

There was no overreaching; to the contrary, a fee structure with escalating percentages in the event of appeal is a "common feature of contingent fee contracts." Wolfram, *Modern Legal Ethics* 532 (1986). Such fee agreements have often been reported and, in particular, have been enforced in California. *See, e.g., Lane* v. *Wilkins*, 229 Cal. App. 2d 315, 40 Cal. Rptr. 309 (1964) (contract provided for 33⅓ percent contingency at trial,

[44] Petitioner never responded to respondent's statement that he would entertain a counter-proposal concerning the terms of representation on appeal. *See* R. 256, at 14, E.R. 191.

40 percent on initial appeal, and 45 percent on appeal to state supreme court); *Hagge* v. *Bauer*, 827 F.2d 101, 111 (7th Cir. 1987) (40 percent at trial, 55 percent on appeal); *Kirchoff* v. *Flynn*, *supra*, 786 F.2d at 324 n.5 (40 percent at trial, 50 percent on appeal); *Sears* v. *Atchison, T. & S.F. Ry.*, 779 F.2d 1450, 1451 (10th Cir. 1985) (33⅓ percent at trial, 40 percent on appeal).; *Gaines* v. *Dixie Carriers, Inc.*, 434 F.2d 52, 53 (5th Cir. 1970) (40 percent at trial, 50 percent on appeal). Contracts providing for a 40 percent fee at trial and a 50 percent fee on appeal are within the typical range. *See* Wolfram, *supra*, at 532 n.44.

Petitioner also argues (Br. 38) that he was misled by the statement in the contract that the fee "is not set by law but is negotiable between Client and Attorney" (Br. in Opp. A2). That statement is required by California law. *See* Cal. Bus. & Prof. Code § 6147(a)(3). Petitioner's contention that the statement is incorrect begs the basic question presented in this case, i.e., whether section 1988 establishes the maximum fee that may be charged. If it does not, as the courts below held, then the statement is perfectly accurate. If it does, then the statement is irrelevant because petitioner will be excused from paying the contingent fee due under the contract.[45]

Finally, petitioner argues (Br. 37-38) that respondent should have informed him of the availability of an award under section 1988, relying primarily on *Denton* v. *Smith*, 101 Cal. App. 2d 841, 226 P.2d 723 (1951). The argument is ill-founded. Respondent accurately informed petitioner of the law pertaining to section 1988 as it then stood in the Ninth Circuit and of his own experience with respect to the availability of fees: that fees could be

[45] Whatever this Court holds, the statement in the agreement accurately reflected the law in the Ninth Circuit at the time of the contract. *Hamner* v. *Rios*, 769 F.2d 1404 (9th Cir. 1985), was decided before the agreement between petitioner and respondent was signed.

awarded under section 1988 but that respondent had never successfully collected them. As respondent stated, "I never told [petitioner] that any award of attorneys fees * * * never amounted to anything. I did tell him * * * that I had never successfully collected those fees."[46] *See also* *Willard* v. *City of Los Angeles*, *supra*, 803 F.2d 526; *Mitchell* v. *City of Los Angeles*, *supra*, 753 F.2d 86.

The state appellate court decision in *Denton* v. *Smith* is not on point. There, the contract for legal services failed for want of consideration because the lawyer did not explain to his client that he probably would be able to recover his interest in the probate matter "without requiring *any* legal services on [the lawyer's] part." 226 P.2d at 725 (emphasis added). Moreover, the parties in that case had an attorney-client relationship "for more than a month prior to" the date on which the contract was executed, yet the attorney did not suggest an "independent advisor" to review the contract (*id.*). Here, in contrast, there was ample consideration for the contract and there was no attorney-client relationship when it was executed. When the time came to discuss representation on appeal, respondent ensured that petitioner had the benefit of the independent counsel contemplated in *Denton*.

In view of respondent's experience with section 1988 fee waivers by his clients in other civil rights actions, he was unwilling to represent petitioner without the protection of a contingent fee contract that offered the prospect of an enforceable right to fees in the event of recovery.[47] The agreement nonetheless reflected the possibility of an award under section 1988 and protected petitioner by providing that any such award would be credited against

[46] R. 256, at 13, E.R. 190.

[47] Respondent's declaration details four cases in which his clients waived their right to fees under section 1988 as part of settlements, thereby eliminating his primary source of compensation for his substantial services that in each case led to the attainment of his clients' objectives. R. 256, at 17-20, E.R. 194-197.

the contingent fee (Br. in Opp. App. A3). In short, petitioner obtained counsel of his choice through the written retainer, respondent provided "exceptionally competent" [48] legal services in reliance on the fee stated in the contract, and petitioner received the benefits of those services in the form of a recovery more than twice that awarded at trial in the prior state proceeding.

For all these reasons, this Court should affirm the concurrent findings below that the contract was reasonable, and certainly not unfair to petitioner.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[48] R. 242, at 6, E.R. 134.

No. 88-1725

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

JUAN FRANCISCO VENEGAS,
Petitioner,
vs.
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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I.

RESPONDENT'S STATEMENT OF THE CASE IS SELECTIVE AND OMITS IMPORTANT FACTS

The facts in this case are important for two reasons. First, the facts demonstrate the wisdom of the rule that a civil rights court-awarded legal fee limits the amount payable by a client to an attorney. This rule advanced by Petitioner ("Venegas") would eliminate the type of disputes between the lawyers and the client which have arisen in this case.

Second, the facts show that under the circumstance of this case, as a matter of law, the client, Venegas, should not be required to pay his attorney, Respondent ("Mitchell"), the amount sought by the attorney. Thus, for these reasons, it is important to correct any incorrect impressions that might arise from the factual assertions in Respondent's Brief.

Mitchell asserts that Venegas has not paid any of the court-awarded fee to Mitchell. That sum, along with the entire disputed amount, is, as Mitchell acknowledges, in an escrow account, pending resolution of this dispute. Brief For The Respondent ("BR") p. 7, n. 13. Venegas agreed to permit Mitchell to have a lien on the amount of the court-awarded fee (RT October 20, 1986, p. 11), and even agreed to assign that amount to Mitchell. *Id.* at pp. 12-13. Moreover, at the outset Venegas paid Mitchell a $10,000 non-returnable retainer. R 260 p. 13, ¶ 2. The sums in escrow are earning interest.

Mitchell refers to the court-awarded fee of $117,000 and his claim for $406,000. The total court award for all attorneys was $117,000, but the total amount that would be due to the attorneys under the contingent fee agreement is in excess of $800,000. Mitchell entered into the

contingent fee contract and then brought in additional counsel, who were to share in his fees. In addition, prior attorneys whose fees are covered by the court award are seeking substantially more than awarded them ($98,000 even though the court awarded them $15,000). Mitchell and his co-counsel are seeking in addition to $800,000, approximately $180,000 because Venegas settled the case with the City after they withdrew and without their consent. Brief For The Petitioner ("BP") p. 7 n. 4.

With regard to the question of risk of non recovery at the outset, certain facts are important. Mitchell's time records show that he first met with Venegas on September 18, 1985, when he spent 1½ hours with him. It is noted in that time record that he prepared the substitution of attorneys that day. R 236, Ex. 1 to Mitchell Declaration. That is the day that the contingent fee agreement is shown to have been executed. Mitchell's time records indicate that it was not until the next day that Mitchell even began to examine the file. As Mitchell concedes, all of the pretrial pleadings and discovery had already taken place. Legal issues had already been resolved, for the case had been up to the Court of Appeal. *Venegas v. Wagner*, 704 F.2d 1144 (9th Cir. 1983).

As the case had been tried before, all of the witness testimony was available and jury instructions had already been prepared. There is no indication that Mitchell had to research any difficult areas of law.

The reason why Mitchell so promptly obtained the contingent fee agreement is obvious. A case which had already resulted in a $1,000,000 jury verdict was fully prepared and ready for trial. At the time there was already a deposition of a witness who testified that the police induced him to perjure himself at Venegas' murder trial. RT Vol. 4 pp. 4, 15-18. For relatively little work over

a brief period of time, Mitchell gained $10,000 and stood to gain at least $400,000 (assuming a $1,000,000 recovery) and likely substantially more. In fact, the trial itself lasted only six days, with jury instructions and deliberations thereafter. For this Mitchell claims that under his contingent fee agreement the attorneys are now entitled to over $800,000. With the additional claims, plus interest, the attorneys' claims are in excess of $1,000,000. Moreover, Venegas had to retain a new attorney for the appeal to achieve a recovery.

Mitchell points to the fact that he obtained a $2,000,000 judgment which was more than the earlier $1,000,000 state court verdict. Whatever the value of Mitchell's services, it was reflected fully in the trial court's award, which awarded him substantially more fees than the "lodestar" and more than he requested. All the attorneys only requested a total of $86,760 (Mitchell requested $37,870) (R 236, 235) and failed to disclose to the court the amount that would result from the contingent fee agreement. In doing so, the attorneys, under their theory, assumed that Venegas would have to pay a larger portion of his award to them. This failure to disclose the amount of the contingency agreement to the court and the failure to seek a greater fee award from the defendants was certainly not in Venegas' interest.

The contingent fee agreement provided that it "covers one trial only" and that the parties are not obligated to continue the employment "[i]n the event there is a mistrial or an appeal." R 260 p. 13. Venegas understood this to mean that if he lost the trial, the $10,000 did not obligate Mitchell to appeal. R 254, Venegas Decl. 1. If he won the trial, defending any appeal is an obvious requirement to effecting a recovery. Indeed, paragraph 8 specifically refers to the attorney's right to a fee award made by

"any appellate court," suggesting that defending an appeal was part of the services to be rendered. Mitchell concedes he demanded an additional 10% of the judgment for the appeal. That is over $200,000. The court-awarded fee for the appeal was $33,000. Order of the Ninth Circuit of April 11, 1988. Mitchell does not and cannot deny that the record shows that his disclosure to Venegas regarding the availability of a § 1988 award was less than informative.

It should be noted that Mitchell filed his motion for a lien while he was still counsel of record for Venegas and still purporting to act on behalf of Venegas. RT October 20, 1986, p. 16; R 269 There is no indication that at the time a substitution had been signed by both parties.

II.

RESPONDENT'S EXCLUSIVE RELIANCE ON THE LANGUAGE OF § 1988 IGNORES PROPER IMPLEMENTATION OF THE STATUTE

Mitchell argues that § 1988 does not specifically cover attorney-client arrangements and therefore such arrangements should be enforceable. Mitchell fails to deal adequately with the point that regardless of any specific interpretation of § 1988, the Court, in exercising supervisory power, should limit the fee to that awarded by the court under § 1988. Mitchell concedes that federal courts have the authority, and have exercised that authority, to regulate attorney-client agreements. RB 29-30; *see, e.g., Schlesinger v. Teitelbaum,* 475 F.2d 137, 141 (3d Cir. 1973). As the court said in *Dunn v. H.K. Porter Co., Inc.,* 602 F.2d 1105, 1108 (3d Cir. 1979), "Because contingency fee agreements are of special concern to the courts and are not to be enforced on the same basis as are ordinary commercial contracts . . . courts have the power to monitor such contracts either through rule making or on an *ad hoc* basis." *See* Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?,* 37 U.C.L.A. L. Rev. 29, 39 n.42, 55-56 (1989) ("Brickman"); C. Wolfram, *Modern Legal Ethics* 498 (1986) ("Courts commonly state that contingent fee contracts . . . are subject to stricter scrutiny than other types of contracts . . . .")[1] By virtue of the authorities and judicial power, § 1988 awards supersede contingent fee agreements.

In addition, § 1988 itself is a basis for such a rule. Although § 1988 says nothing about how to compute the fee award or whether the fee is recoverable even if no fees are actually incurred by the plaintiff or whether the fee can be waived by the client, or other such issues, this Court has nevertheless rendered opinions deciding such issues in a way to carry out or implement the purposes and intent of the statute. *See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711, 730 (1987) (refers to "desirable and appropriate application of the statute"); *Evans v. Jeff D.,* 475 U.S. 717 (1986); *Blum v. Stenson,* 465 U.S. 886 (1984); *Hensley v. Eckerhart,* 461 U.S. 424 (1983). In these cases the Court has fashioned rules to implement § 1988 even though the statute itself does not have explicit language on the issues.

In Fair Labor Standards Act litigation involving a fee-shifting provision (29 U.S.C. § 216), a panel including Judges Learned and Augustus Hand said, "We have considerable doubt as to the validity of the contingent fee agreement; for it may well be that Congress intended that

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[1]Courts may give less consideration to contingent fee contracts entered into by large corporate clients represented by counsel, such as in *Brobeck, Phleger & Harrison v. Telex Corp.,* 602 F.2d 866 (9th Cir. 1979). Wolfram, *supra* at 499.

an employee's recovery should be net, and that therefore the lawyer's compensation should come solely from the employer." *Skidmore v. John J. Casale, Inc.,* 160 F.2d 527, 531 (2d. Cir. 1947) (Frank, J.). In *Harrington v. Empire Const Co.,* 167 F.2d 389, 392 (4th Cir. 1948), the court said, "we are clearly of the opinion that an agreement by an employee, in case he succeeds in the District Court, to pay his attorney a sum in addition to the counsel fee allowed by the court is contrary to the purpose of the statute and therefore invalid." *Accord, Burke v. Mesta Mach. Co.,* 79 F.Supp. 588, 615 (W.D. Pa. 1948).

The contingent fee contract is based on a federal civil rights claim. The implementation of § 1988 does not displace state law, for state law does not guarantee a contingent fee recovery. But even if there were a preemption issue, contrary state law would interfere with the methods by which § 1988 was designed to reach its goals. *See International Paper Co. v. Ouellette,* 479 U.S. 481, 491-494 (1987) (preemption though act silent on issue).

III.

RESPONDENT'S POSITION DOES NOT LOGICALLY FOLLOW FROM THE CASES OR THE PURPOSES OF THE STATUTE

Mitchell contends that *Blanchard v. Bergeron,* 109 S.Ct. 939 (1989) shows that statutory awards and attorney-client fee contracts are independent.

The purpose of § 1988 was to insure that the successful civil right plaintiff did not have to pay for vindicating a public right. 122 Cong.Rec. 33314 (Sen. Kennedy). There are two ways to accomplish this. Either the fee that a client has agreed to pay a lawyer is shifted fully to the

losing party or the court determines the reasonable compensation for the plaintiff's lawyer for all purposes.

Blanchard v. Bergeron ruled out the first option when the Court stated, "The defendant is not, however, required to pay the amount called for in a contingent fee contract if it is more than a reasonable fee calculated in the usual way." 109 S.Ct. at 944. The second option is the one left to accomplish the purpose. The attorney is entitled, whether directly or indirectly, to the court awarded fee, "no more and no less." *Id.* As Senator Kennedy stated, the lawyer's "fee is contingent not only upon his success, but also upon the discretion of the judge before whom he appears . . . his rate of compensation is fixed not by a grateful client, but by a disinterested judge." 122 Cong.Rec. 33314.

Under Mitchell's theory, if the fee awarded by the court is higher than the contract amount, the plaintiff should be able to pay the contract amount and keep the balance — a "perhaps surprising result." 1 G. Hazard & W. Hodes, *The Law of Lawyering* 72.5 (1989 Supp.) Also, under this theory, when a public interest firm handles a case for a civil rights plaintiff without a fee arrangement, or if an attorney handles a civil rights case on a *pro bono* basis, the plaintiff could keep the § 1988 award and pay nothing to the public interest attorneys.

Mitchell's assertion that eight justices in *Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air, supra,* 488 U.S. 711, recognized contingent fees for attorneys in excess of the § 1988 awards is not persuasive. That issue was not before the Court. The plurality, in pointing out that fee enhancements are not necessary in certain kinds of cases, included as an example "a damages case that competent lawyers would take in the absence of fee shifting statutes." *Id.* at 726. This does not mean that

contingent fee contracts are necessarily enforceable in civil rights cases. It means that if the case is sufficiently strong so that an attorney would have taken it without a fee-shifting statute, no such enhancement is necessary. The dissent's reference to contingent fee contracts was in the context of determining enhancement in a number of situations in which the risk of compensation is mitigated. *Id.* at 749. The dissent does not address directly the issue in the instant case. In his dissent in *Hensley v. Eckerhart,* 461 U.S. 424, 445-446 (1983), Justice Brennan (joined by the dissenters in *Delaware Valley*) observed that Congress, by enacting § 1988 intended to enforce civil rights laws "by continuing to rely on the private bar and by *making the defendants bear the full burden of paying for their civil rights obligations.*" *(Emphasis added).* Certainly, the remarks in *Delaware Valley* are less indicative of judicial intent than the Court's statement in the near unanimous opinion in *Blanchard v. Bergeron* that § 1988's purpose was "that a plaintiff's recovery will not be reduced by what he must pay his counsel." 109 S.Ct. at 944.[2]

The circuit courts are not "virtually unanimous," as suggested by Mitchell. *Cooper v. Singer,* 719 F.2d 1496 (10th Cir. 1983) was an *en banc* opinion, and in *Wheatley v. Ford,* 679 F.2d 1037, 1041 (2d Cir. 1982), the court could not have been clearer: "we hold that, to the extent counsel receives payment of the section 1988 statutory award, his claim for services rendered under his contingency fee arrangement with his client shall be deemed

[2]In his brief before this Court in *United States Dep't of Labor v. Triplett* and *Committee on Legal Ethics v. Triplett,* Nos. 88-1671, 88-1688, the Solicitor General notes that any assumption that under the fee-shifting provision in *Delaware Valley* plaintiffs were not barred from entering into supplementary fee arrangements with their counsel "is by no means certain." p.27 n.12.

paid and satisfied." The other circuit cases generally differ as to the rights of client and attorney.[3] By dealing directly with the attorney-client arrangement (including enforcement thereof), these cases show that § 1988 cannot be divorced from such arrangements.

Mitchell contends that Venegas' argument would lead to the invalidation of fixed retainers and hourly fee charges if they exceed the statutory award. BR 22. But this is highly theoretical because the statutory fee is a reasonable fee, and an attorney cannot charge a client more than a reasonable fee.

Mitchell suggests that contingent fees are different than regular fees and therefore may exceed what would be considered a reasonable fee. BR 26-28. But the § 1988 fee is also contingent. There is no reason to differentiate between what should be a reasonable fee under § 1988 and under any agreement between attorney and client, even if the fee is contingent. The determination of "reasonable" in *Delaware Valley, supra,* 483 U.S. 711, is applicable to a determination of what is a reasonable fee between attorney and client in the civil rights context. *See City of Riverside v. Rivera,* 477 U.S. 561, 581, 586 (1986) (Powell, J. concurring) ("asserted analogy to personal injury claims impersuasive in this context"). Also, unlike the normal tort case, the civil rights client has a risk, for if he

[3]*E.g., Hamner v. Rios,* 769 F.2d 1404, 1409 (9th Cir. 1985) (court has discretion to compel prevailing party to pay the difference between the awarded fee and the contract amount); *Sullivan v. Crown Paper Bd. Co., Inc.,* 719 F.2d 667, 670 (3d Cir. 1983) (counsel receives contingent fee or awarded fee, whichever is greater, although opinion did not exclude attorney receiving both); *Pharr v. Housing Authority of Prichard,* 704 F.2d 1216, 1217-18 (11th Cir. 1983) (defendant should pay the difference even if it exceeds what might normally be awarded under § 1988).

loses, under certain circumstances, he could be responsible for the defendant's expenditures.

Mitchell argues that under Venegas' position, private fee contracts would be nullified in "antitrust cases and other commercial contexts." BR 22. The Court need not reach the issue for non civil rights cases. This Court has recognized that civil rights cases are not comparable to other types of cases. *City of Riverside v. Rivera, supra,* 477 U.S. 561, 574. Repeatedly throughout its opinion in the *City of Riverside* case, the plurality stressed the importance of the fact that it was reviewing an award of attorneys' fees in a civil rights case. *Id.* at 574-579 ("the enforcement of civil rights laws cannot be entrusted to private sector fee arrangements." *Id.* at 579.). The legislative history of § 1988 and case law emphasize the important policy of encouraging private litigants to act as private attorneys general to vindicate civil and constitutional rights. *See Hensley v. Eckerhart, supra,* 461 U.S. at 443 n.2 (dissent) ("Civil rights plaintiffs with meritorious claims 'appear before the court cloaked in a mantle of public interest.' "). These same considerations are not present in commercial cases. In commercial, and ev antitrust cases, the plaintiff acts primarily to further his own economic interest.

IV.

THE LEGISLATIVE HISTORY OF § 1988 DOES NOT SUPPORT RESPONDENT'S POSITION

As noted in Petitioner's Brief, the legislative history shows that the purpose of § 1988 was to insure that successful civil rights plaintiffs would incur no expense for attorney's fees. This would also have the effect of attracting civil rights lawyers.

Nowhere in the legislative history is there any mention of preserving attorney-client contingent fee contracts. Had contingent fee contracts been a significant incentive for civil rights attorneys, there would have been no need for § 1988.

Mitchell's references to the legislative history are either inapposite or out of context. For example, Mitchell refers to remarks of Senator Allen. BR 14 n.17. Senator Allen vigorously opposed the legislation, *See, e.g.,* 122 Cong.Rec. 31473. His references to contingency fees were in connection with his chagrin that, in his view, the availability of such fees was, in effect, permitted in certain instances in the Hart-Scott-Rodino Antitrust Improvement Act of 1976. 15 U.S.C. §§ 15c, g. He further argued that fee shifting provisions were simply for the benefit of lawyers. 122 Cong.Rec. 31473, 31487, 31830, 31850 (1976). The reference in the Congressional Record to a law review article about antitrust laws, to which Mitchell points, (*e.g.,* BR 21 n. 30), is not significant because, *inter alia,* that article was inserted by Senator Thurmond not to support the legislation (122 Cong.Rec. 32389), and there was no real discussion of its substance.

The rebuttal from the proponents of the legislation was that attorneys will not make substantial sums or windfalls from civil rights cases. As Senator Kennedy said, "We are not talking about the kind of attorneys' fees that were included in the antitrust bill." 122 Cong.Rec. 31851. He disagreed with opponents of the bill who claimed it was "a lawyers' relief bill." He distinguished civil rights cases from antitrust and tort cases and noted that with the enactment of the bill, the attorney's fee "is contingent not only upon his success, but also upon the discretion of the judge before whom he appears." 122 Cong.Rec. 33314.

Other references to the legislative history by Respondent are also either irrelevant or out of context. For example (BR 20), when Representative Seiberling said the proposed legislation "certainly is not going to make attorneys' fees any less," he responded to a question as to whether the legislation would increase or decrease fees in civil rights litigation. He added to his comment, "I would expect there would certainly be more cases where attorneys' fees are awarded."[4] What he meant was that as a result of the Act, overall fees to attorneys will increase. The remark had nothing to do with fees or contingent fees in specific cases.[5]

The fact that other statutes deal specifically with attorneys' fees is not relevant. As pointed out in *Aleyska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 252-255 (1975), some statutes have expressly provided that fee-shifting provisions do not limit the amount of fees that an attorney and his client might agree upon between themselves. Thus, the absence of any provisions dealing specifically with the attorney-client relationship does not necessarily signify an intent not to cover attorneys' recoveries.

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[4]*Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 94th Cong. 1st Sess. 49 (1975) ["*House Hearings*"].

[5]In response to concerns about fees reducing awards in condemnation cases (House Hearings 103-117), one Congressman's solution was a proposed fee-shifting provision similar to § 1988. *Id.* at 241. Contrary to Respondent's statement that House Members considered barring contingent fees (RB 15 n.19), only one Congressman raised a question about contingent fees in condemnation cases because there is always some recovery in those cases. *Id.* at 116.

None of the statutes cited by Mitchell deals with the subject matter of § 1988, and thus they are not *in pari-materia.* A number of the acts referred to by Mitchell were enacted after § 1988 and therefore have no bearing on § 1988. *See, e.g.,* 42 U.S.C. § 300 aa-15(e)(1)(A); 15(e)(3). Moreover, it "is unrealistic to assume that whenever the legislature passes a statute it has in mind all prior acts relating to the same subject matter." 2A *Sutherland Stat. Const.* § 51.01, p.450 (4th ed.). Certainly it did not have in mind prior acts unrelated to the subject matter.

The National Vaccine Injury Compensation Program, 42 U.S.C. § 300 aa-10 *et seq.,* is hardly comparable, for it provided for unique procedures, fee awards to non-prevailing parties and limitations on damages. The Hart-Scott-Rodino Antitrust Improvement Act of 1976 dealt with those authorized to bring actions on behalf of the state. 15 U.S.C. § 15c(d)(1); g(1).[6] Here we deal with under what circumstances fee agreements are not fully enforceable. Other statutes cited by Mitchell are not fee-shifting statutes. *E.g.,* 28 U.S.C. § 2678; 38 U.S.C. § 3404(c) and (d). Fee limitation statutes are not relevant. *See Walters v. National Ass'n of Radiation Survivors,* 473 U.S. 305, 323-324 (1985) (such statutes seek, in part, to keep the process nonadversarial). *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 442 (1987) is irrelevant as it deals with items of costs that may be taxed.

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[6]The statute limited the states as to whom they could hire so that they would "be encouraged to develop their own in-house antitrust capability." 1976 *U.S. Code Cong. and Admin. News* 2572, 2579.

V.

PETITIONER'S POSITION WILL NOT MAKE IT MORE DIFFICULT TO OBTAIN REPRESENTATION IN CIVIL RIGHTS CASES

Mitchell refers to *Evans v. Jeff D.*, 475 U.S. 717 (1986), in which the Court provided that *before* the fee award (and absent a contractual provision precluding a waiver) the court-awarded fees could be waived.

Mitchell claims that by invalidating the contingent fee contract the attorney would be left with nothing. RB 23. Under Mitchell's theory, those attorneys representing civil rights plaintiffs with little damages or the right to non damage relief can be left without a fee, but those representing greatly damaged civil rights plaintiffs should be protected. Moreover, Mitchell ignores Venegas' discussion at PB31 regarding the possible role of contingent fee agreements. As noted, it is arguable that by contract (as in the instant case), or by law, the contingent fee cannot be waived by the client prior to the court award. Whether or not this is so, it is Venegas' position that it is the *§ 1988 award* that supersedes the contingent fee agreement. That it is the plaintiff who is awarded the fee has no significance. *See Evans v. Jeff D., supra,* 475 U.S. at 730 n. 19 (1986) (citing *Cooper v. Singer, supra,* 719 F.2d 1496).

Mitchell argues, without any support in the record, that without contingent fees, there will not be sufficient civil rights lawyers. When Congress considered whether to enact § 1988, supporters cited as a reason that lawyers were unavailable. Apparently, the availability of contingent fees had little impact. *Evans v. Jeff D., supra,* 475 U.S. at 756 n.10 (dissent). Amici refer to the "already severely diminishing number of attorneys willing to handle such cases," (Brief of Amici Curiae 6 ("BAC")), an alleged condition which exists prior to any ruling by this Court.

The availability of court awarded fees, especially in light of the ever expanding pool of lawyers,[7] was supposed to alleviate any concerns about the availability of lawyers to handle meritorious civil rights cases. Amici suggest that § 1988 has not served its purpose because of an alleged decline of civil rights filings. (BAC 21). Contingent fee contracts have not prevented any such alleged decline. Also, as large damage civil rights cases comprise a small percentage of civil rights cases, the availability of contingent fee contracts could only benefit a few of the already high profile lawyers who handle such cases.[8] In civil rights cases, unlike tort cases, these lawyers will profit from § 1988 if the recovery is small *and,* under Amici's theory, from the contingent fee contract if the recovery is large. *See also Pennsylvania v. Delaware Valley Citizens' Council, supra,* 473 U.S. at 727, (unavailability of contingency enhancements should not result in the "bar in general" being "unable to respond that the goal of the fee-shifting will not be achieved"). Also, the most severely damaged plaintiffs should not bear the burden of attracting civil rights attorneys.

Justice Marshall has aptly pointed out that fee concepts are not the solution to funding problems for public interest law. "Thus, support for this broadened range of

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[7]During the 1980s "35,000 to 40,000 new J.D.s flowed out of the nation's law schools each year. When the decade ended there were nearly a quarter-million more practicing attorneys than there were at the beginning." Thompson, *In The 1980s, Lawyers Took The Spotlight,* The Los Angeles Daily Journal, Dec. 26, 1989. p.1.

[8]As to the large profits and windfalls derived from such cases, *see* Brickman 76 n.186.

activities must come from a permanent, more comprehensive source." *House Hearings* 29, 31.

Amici contend that if attorney's fees are limited to a reasonable fee, there would be "a setback to the enforcement of civil rights and environmental laws." BAC 8. They misconceive the issue. Civil rights and environmental laws will be set back if the fees to attorney's come not from malefactors found guilty of violating laws, but out of the pockets of the innocent victims.

In his recent study of contingent fees, Professor Brickman concludes that the present contingent fee model is inadequate and unfair and that courts often "are oblivious to serious abuses by lawyers of their fiduciary obligations to clients. . . ." Brickman 32. He argues that there should be "enhanced judicial supervision of contingent fees." *Id.* at 127; *see id.* at 108, 111-114.

> "Contingent fee setting today operates in a milieu substantially devoid of fiduciary oversight. Overcharging clients is routine and typically unquestioned, especially when the client is unaware of the degree to which it has occurred. So pervasive are these abuses that one may legitimately describe the current regulatory scheme as 'rotten'." *Id.* at 127-128.

It is this "rotten" system which Mitchell advocates for the civil rights area. The insurance driven personal injury system should not be the model for civil rights.

The transparent plea for freedom of contract by amici is particularly hollow when it comes to the oppressive contingent fee agreement exemplified by the instant case.

VI.

RESPONDENT'S RELIANCE ON INADEQUATE LOWER COURT FINDINGS IS MISPLACED.

The trial court, without discussion or findings as to any of the facts, simply concluded that the contingent fee did "not constitute a windfall" (Pet.App. A-28), and that the parties acted "within their rights" with respect to Mitchell not handling the appeal. *Id.* at A-29. The Court of Appeals concluded that the trial court did not abuse its discretion because Venegas did not present evidence that a 40% contingent fee was not standard in California for civil rights cases or that his case posed an unusually low risk for civil rights cases. *Id.* at A-17.[9] If a 40% contingency for one trial only is standard, what are standard percentages for newly retained attorneys for later proceedings?

Neither court considered such factors as the circumstances under which the contract was made, the prior trial or the effect of the withdrawal. Neither court explored factors suggesting that the contract was adhesive.[10] Moreover, neither court considered the effect of state law, which under § 1988, can be applicable to civil rights cases. Indeed, the Court of Appeals expressly left open the issue

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[9] "Courts with an incomplete comprehension of the applicability of fiduciary principles to fee contracts often believe that the reasonableness of contingent fee should be determined by such factors as the effort expended, the results obtained and the causal relationship between the attorneys' efforts and the results." Brickman 86-87.

[10] The fee contract had all the qualities of an adhesion contract. It was drafted by the attorney, it involved parties of unequal bargaining strength, and the party of lesser bargaining strength had no real opportunity to obtain independent advice. Courts have declined to enforce provisions of adhesion contracts. *See Steven v. Fidelity & Casualty Co.*, 58 Cal.2d 862, 337 P.2d 284 (1962).

of the validity of the contingent fee agreement under state law.[11] Venegas contends that all of these factors should have been considered and that if they were considered, as a matter of law, the court should have declared the contingent fee agreement unenforceable. Certainly, the trial court should not have been able to deem a contract "reasonable" without considering these factors. Contrary to the views of the lower courts in this case, it is the attorney who "must demonstrate that the fee arrangement was fair and equitable, that the services performed were reasonably worth the amount claimed, and the agreement was voluntarily executed by the client with full knowledge of the pertinent facts." Brickman 55 n.96. Before this Court can defer to a trial court determination that a contract is reasonable — a contract which involves an issue of close to $1,000,000 — there should have been a full and fair hearing and consideration of all of the facts.

This Court should enumerate the factors that should be considered and apply them in this case. In so doing, it should deem the contingent fee contract in the instant case unenforceable. The idea that attorneys can end up with close to a million dollars for work which they valued at $56,710 (R 236, 235) and the court valued at $102,000 — having refused to handle the appeal or collect the award without more money — is simply unconscionable. To force Venegas to continue to incur legal expense in federal and state courts over the issue of the enforceability of the contract would also be unfair and oppressive. As recently said, "[p]ublic regard for lawyers in general slipped to an all-time low during the 1980s, while the

[11]At the district court hearing, Mitchell said that any decision "would have to be without prejudice to whatever occurred regarding the contingent fee in state court." The trial judge agreed. RT. Oct. 20, 1986, p. 7.

profession's apologists dwindled in number." Thompson, *supra*, The Los Angeles Daily Journal, Dec. 26, 1989 p.1. This Court should not put its imprimatur on the asserted right of attorneys to seek and get whatever they demand, at the expense of their clients. A fee of over $800,000 under these circumstances is *per se* unreasonable.

Mitchell has supplied no case which approves an arrangement similar to the one in this case. Both under federal law and state law, a contingent fee agreement is not enforceable when the attorney withdraws; he is only entitled, at most, to a quantum meruit recovery.

Mitchell miscited and took out of context a quote from *Fracasse v. Brent,* 6 Cal.3d 784, 494 P.2d 9 (1972). That case held that under no circumstance is the attorney entitled to enforce his contingent fee agreement if he is not the attorney at the time of the recovery. The court did not say that if the attorney is discharged on the courthouse steps he can enforce the contingent fee agreement. Mitchell omitted language from this quote. The court said, "[t]o the extent such discharge occurs 'on the courthouse steps,' where the client executes a settlement obtained after much work by the attorney, the factors involved in a determination of reasonableness would certainly justify a finding that the entire fee was the reasonable value of the attorney's services." *Id.,* 494 P.2d at 14. Thus, a courthouse steps settlement just goes to a determination of a reasonable fee.

Mitchell did not perform all the services he was required to perform. Even if he did not have to handle the appeal — a highly questionable proposition — he still had to effect the recovery of the monies. He was only to be paid out of the "recovery" he obtained. When he declared he had completed his services, the recovery was zero. Forty percent of zero is zero.

If one were to construe the contract to mean that it covers "one trial only," it would not even cover post trial motions. This is just as absurd as concluding it does not cover collection of the monies. Mitchell lost "sight of the nature of the judicial process. In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not the judgment, but some action . . . by the defendant that the judgment produces — the payment of damages . . . Redress is sought *through* the court, but *from* the defendant." *Hewitt v. Helms,* 482 U.S. 755, 761 (1987).

Clearly under any theory, Mitchell did not perform fully all of his obligations under the contingent fee agreement, and he withdrew as counsel prior to the occurrence of the contingency. Thus at best he is entitled to only the reasonable value of his services, which value the court has already determined under § 1988.

CONCLUSION

The Court should reverse the judgment below and grant the relief requested by Petitioner.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JUAN FRANCISCO VENEGAS,

Petitioner,

VS.

MICHAEL R. MITCHELL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE SAPERSTEIN & SELIGMAN, CALIFORNIA TRIAL LAWYERS ASSOCIATION, CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION, PLAINTIFFS EMPLOYMENT LAWYERS ASSOCIATION, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, EQUAL RIGHTS ADVOCATES, CENTER FOR LAW IN THE PUBLIC INTEREST AND PUBLIC ADVOCATES, INC.

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QUESTION PRESENTED

Did Congress, in enacting the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, intend to add recovery of statutory fees to the already existing system of fee agreements without abrogating enforceable written contracts?

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE SAPERSTEIN & SELIGMAN, CALIFORNIA TRIAL LAWYERS ASSOCIATION, CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION, PLAINTIFFS EMPLOYMENT LAWYERS ASSOCIATION, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, EQUAL RIGHTS ADVOCATES, CENTER FOR LAW IN THE PUBLIC INTEREST AND PUBLIC ADVOCATES, INC.

INTEREST OF AMICI CURIAE

Amici curiae represent an array of private civil rights attorneys and trial lawyers' organizations who depend on fee agreements in their representation of civil rights, environmental, and public interest plaintiffs. Amici also represent numerous non-profit civil rights and public interest organizations which are actively involved in civil rights cases.

The amici are:

SAPERSTEIN & SELIGMAN, P.C., Oakland, California

This seventeen-year-old, 32-lawyer firm specializes in plaintiffs' employment discrimination litigation, both individual and class actions. Contingent fee agreements are commonly chosen by clients because civil rights victims typically cannot afford any other type of fee arrangement. Frequently, the client is not obligated to pay for either costs or legal services during the course of the litigation.

A contingent fee agreement which entitles the firm to a percentage of the recovery is an important incentive for undertaking the risk of representing civil rights plaintiffs. Prohibiting the firm from entering into contingent fee agreements would seriously deter them from representing civil rights plaintiffs.

CALIFORNIA TRIAL LAWYERS ASSOCIATION

The California Trial Lawyers Association (CTLA) is a statewide organization of plaintiffs' trial attorneys. CTLA's approximately 6,500 members derive legal fees from contingent fee work and have represented hundreds of civil rights plaintiffs on contingent fee contracts. If CTLA's members were prohibited from entering into contingency fee agreements, many would simply not handle civil rights cases.

CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

The California Employment Lawyers Association is a statewide organization of plaintiffs' attorneys who practice employment and discrimination law. Members of this organization are involved in employment and civil rights cases and commonly accept representation of plaintiffs on a contingent fee basis. Currently, there are a small number of attorneys left in California willing and capable of prosecuting employment

discrimination cases on behalf of plaintiffs. This figure would dwindle to almost nothing if employment attorneys were prohibited from contracting with their clients on a contingency basis for a percentage of the recovery.

PLAINTIFFS EMPLOYMENT LAWYERS ASSOCIATION

The Plaintiffs Employment Lawyers Association (PELA) is a nationwide organization of plaintiffs employment attorneys. Members of PELA are involved in employment, civil rights and public interest litigation and rely on contingent fee agreements to pursue these cases. If statutory fees were the only fee recovery in civil rights cases, many of PELA's members would be out of the business of prosecuting civil rights claims.

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1967. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States. This objective is pursued in part by MALDEF's provision of free legal representation to civil rights plaintiffs in nonmonetary cases. MALDEF recognizes, however, that the rights of Hispanics are also vindicated in cases involving potentially sizeable monetary recovery by private counsel retained on a contractual basis. Both types of representation are essential to securing the civil rights of Hispanics.

AMERICAN CIVIL LIBERTIES UNION FOUNDATION,
New York, New York
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA
Los Angeles, California

The American Civil Liberties Union ("ACLU") is a non-profit public interest organization with more than 275,000 members and more than 50 affiliates in nearly every state, including the ACLU of Southern California ("ACLU/SC"). Both the ACLU and its affiliates are dedicated to protecting the civil rights and civil liberties of all persons in the United States. The ACLU, through its legal staff and hundreds of volunteer attorneys, has been involved in hundreds of cases brought under the federal civil rights laws to vindicate these rights.

Though the ACLU does not sponsor cases on a contingent fee basis it has a strong interest in maintaining the availability of attorneys fee awards to private counsel involved in bringing civil rights actions. To the extent that the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. Section 1988, is interpreted in a way that creates disincentives for the private bar to handle civil rights cases, the ACLU believes that the purposes of the civil rights laws will be undermined and many deserving civil rights plaintiffs will remain unrepresented.

EQUAL RIGHTS ADVOCATES, INC.,
San Francisco, California

Equal Rights Advocates, Inc. (ERA) is a non-profit public interest law firm dedicated to achieving equality of rights under the law for women. ERA regularly handles intake and referral of sex discrimination matters, and has great difficulty finding attorneys willing to represent clients who cannot afford legal counsel.

CENTER FOR LAW IN THE PUBLIC INTEREST,
Los Angeles, California

The Center for Law in the Public Interest (CLIPI) is a non-profit public interest law firm. CLIPI's public interest litigation includes employment discrimination and environmental cases. The Center regularly handles intake and referral of civil rights, environmental and public interest litigation. Such cases are virtually impossible to refer to private counsel where the client cannot afford the cost of legal services.

PUBLIC ADVOCATES, INC., San Francisco, California.

Public Advocates, Inc. is a non-profit public interest law organization which has been representing poor and minority individuals and organizations since 1971. The bulk of Public Advocates' litigation is in the fields of education, health care, homelessness, economic development and employment. Many, if not most of Public Advocates' cases are co-counseled with private attorneys and legal services organizations. The availability of co-counseling arrangements with private attorneys would be impaired by a prohibition against private fee contracts.

SUMMARY OF ARGUMENT

The amici submitting this brief are private practitioners and non-profit public interest and civil rights organizations that are litigating hundreds of cases under fee shifting statutes. Unless privately negotiated fee agreements are available, the congressional goal of enabling clients to find competent lawyers needed to enforce civil rights and environmental legislation will be frustrated. The already severely diminishing number of attorneys willing to handle such cases would decrease even further if the Court were to take away one of the traditional means for attorneys to undertake representation for clients who cannot afford legal services—the contingent fee contract.

Fee contracts are subject to regulation under state and federal statutes and are even further regulated by state, local and American Bar Association ethical rules and regulations which in this case includes the Rules of Professional Conduct of the State Bar of California. Usurpation of this extensive fee regulation system was not contemplated by Congress when it enacted the civil rights fee shifting provisions.

As there is no indication that Congress intended to eliminate the contract rights of attorney and client, the decision of the Ninth Circuit should be affirmed.

ARGUMENT

I.

FEE AGREEMENTS ARE ESSENTIAL INDUCEMENTS TO THE PROSECUTION OF CIVIL RIGHTS CASES

A. The Fee Agreement Is and Has Always Been a Critical Inducement to Accepting Representation of Clients With Meritorious Claims Who Cannot Afford to Hire Lawyers

Enforcement of privately negotiated fee agreements which permit the attorney to recover a percentage of the damages is consistent with the aim of the fee shifting statutes, which seek to provide an incentive for attorneys to represent clients with meritorious civil rights and environmental claims. This fundamental congressional purpose has been repeatedly recognized by this Court.[1]

The importance of the fee agreement as an inducement is demonstrated by its consistent use in the legal market place in civil rights and comparable complex federal litigation.[2] Unlike civil rights defendants, civil rights plaintiffs often lack the resources to pay for representation during the course of litigation. Indeed, clients represented by *amici* frequently

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[1] *See Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) ("The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances. H.R. Rep. No. 94-1558, p. 1 (1976)."); *Blum v. Stenson*, 465 U.S. 886, 897 (1984) ("The legislative history [of § 1988] explains that 'a reasonable attorney's fee' is one that is 'adequate to attract competent counsel, but . . . [that does] not produce windfalls to attorneys.' S. Rep. No. 94-1011, p. 6 (1976).").

[2] *See, e.g., Manhart v. City of Los Angeles*, 652 F.2d 904 (9th Cir.), *vacated and remanded on other grounds*, 461 U.S. 951 (1983); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 1021 (3d Cir. 1976) (antitrust case); *Farmington Dowel Products Co. v. Foster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1969) ("*Farmington I*").

cannot even afford to pay for the non-fee costs of litigation. Therefore, private civil rights plaintiffs' counsel may have no realistic alternative but to enter into fee arrangements in order to meet the costs of running their practices.

Evans v. Jeff D., 475 U.S. 717 (1986) has made the practical need for fee agreements in cases involving fee shifting statutes even greater. In *Evans*, this Court held that plaintiffs in a civil rights action could waive the right to statutory attorneys' fees. Given the possibility that the client may waive statutory attorney's fees altogether, separate fee contracts between plaintiffs and their counsel have become essential. In an *Evans* situation, the only protection available for private attorneys is to have in effect a fee agreement. If such agreements are not available in fee shifting cases, the threat of forced fee waivers under *Evans* would make civil rights cases financially devastating for plaintiffs' attorneys. Not only would such cases not be financially competitive with other cases, they would lead to financial ruin for even the most successful of plaintiffs' firms.

Failure to enforce ethically permissible fee agreements will undermine the economic viability of the sole practitioners and small firms that make up the bulk of the experienced private civil rights bar, and will inevitably lead to the withdrawal of many of the most experienced and talented attorneys from this practice.[3] Thus, invalidation of privately negotiated fee contracts would be a serious, and perhaps devastating, setback to the enforcement of the civil rights and environmental laws. The only beneficiaries of such a financial disincentive would be the violators of those laws.

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[3] Contrary to Petitioner's assertion at page 28 of his brief, most civil rights litigation is brought by small private firms and solo practitioners. *See* Schwab & Eisenberg, *Explaining Constitutional Tort Litigation*, 73 Cornell L. Rev. 719,768 (1988).

B. Issues Regarding Regulation of the Terms of Fee Agreements Should Be Left to the Extensive Fee Regulatory System

Many of the issues raised by Petitioner involve fact specific matters of contract interpretation and ethical principles that are best left to the extensive enforcement mechanisms already in place among local, state and national bar associations, state regulatory provisions, and fee arbitration panels which routinely regulate attorney-client fee disputes. In this case, this includes the ABA Model Rules of Professional Conduct, Rule 1.5 ("Fees") (1983), the ABA Code of Professional Responsibility DR 1-106 ("Fees for Legal Services") (1981), as well as various provisions of the California Business and Professions Code, § 6000, *et. seq.*, and the California State Bar Rules of Professional Responsibility. In addition, numerous local agencies such as state and county bar associations have fee arbitration panels which routinely consider questions regarding the enforcement of fee agreements.[4]

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[4] *See Mandatory Arbitration of Attorney-Client Fee Disputes: A Concept Whose Time Has Come*, 14 Toledo L. Rev. 1205 (1983). These fee arbitration agencies include: Alaska Bar R. 35-42; Rules of Comm. of the State Bar of Ariz. on Arbitration of Fee Disputes; By-Laws of the Legal Fee Arbitration Comm. of the Bar Ass'n of Greater Cleveland and the Rules and Regulations of its Legal Fee Arbitration Bd.; Rules for Arbitration for Legal Disputes, Conn. Bar Ass'n; Rules of the Fee Dispute Comm. of the Dallas Bar Ass'n; Model Fee Arbitration Bylaws, as adopted by the Fla. Bar Ass'n; State Bar of Ga.'s Fee Arbitration R.; Rules of the Idaho State Bar on Arbitration of Fee Disputes; Rules for the Arbitration Comm., as approved by the Iowa State Bar; Mich. Gen. CT.R.979; Legal Fee Arbitration Plan, as adopted by the Ky. Bar Ass'n; Resolution of Fee Disputes, N.H. Bar Ass'n; N.J.Ct.R. 1:20A; Section 739, By-Laws of the Philadelphia Bar Ass'n Rules to the Fee Dispute Comm. of the Philadelphia Bar Ass'n; Procedures of the Legal Fee Arbitration Bd. of the Minn. State Bar; Rules of the Comm. on Resolution of Fee Disputes, the Bar Ass'n of Metropolitan St. Louis; Fee Arbitration Rules, as adopted by the State Bar of Wis.; Cal. Bus. & Prof. Code § 6200, *et seq.*; Rules of Procedures for the

Reference to state and local fee regulation is not only prudent, but will frequently be necessary in civil rights and other fee shifting cases due to the common existence of pendent state claims. Thus, fee agreements in fee shifting cases frequently apply to both federal and state law claims. For example, in *City of Riverside v. Rivera*, 477 U.S. 561 (1986), plaintiffs prevailed on both their federal claims and their state law negligence claims. *Id.* at 564. Had plaintiffs' counsel wished to enforce a fee contract in that case, the Tenth Amendment would require that the fee contract based on the state law tort causes of action be governed and enforced in accordance with state law.

The same is true of discrimination cases in California, where the state legislature has enacted state statutes prohibiting discrimination in employment, housing and public accommodations and services. *See* Cal. Govt. Code § 12940, *et. seq.;* Cal. Civil Code § 51. Other pendent state claims are often included in federal civil rights cases in California, including intentional infliction of emotional distress predicated on a discrimination theory.[5] In these cases involving both federal and state discrimination causes of action, the California courts would have the right to determine and regulate the attorneys' fees contract questions in accordance with local and state bar professional rules of responsibility, *(footnote 4 continued from page 9)*

Hearing of Fee Arbitration Proceedings by the Alameda County Bar Ass'n; Rules for Arbitration Proceedings for Attorney Fee Disputes, Beverly Hills Bar Ass'n; Rules for Conduct of Fee Disputes and Other Related Matters, Los Angeles County Bar Ass'n; Rules of Conduct of Fee Arbitrations by the Fee Arbitration Comm. of the Santa Clara County Bar Ass'n; San Diego County Bar Ass'n Rules of the Arbitration Comm. *Id.* at 1226 n.104.

[5] *See, e.g., Agarwal v. Johnson*, 25 Cal.3d 932 (1979) (intentional infliction of emotional distress based on racial epithets); *Alcorn v. Anbro Engineering, Inc.*, 2 Cal. 3d 493 (1970) (supervisor shouting epithets to plaintiff).

California contract law, and the fee contract provisions of the California Business & Professions Code.

C. The Invalidation of All Fee Contracts Would be an Unwarranted Affront to the Right to Contract

The result sought by Petitioner would invalidate fee agreements under a number of statutes and would not be limited to interfering with the right to contract only in civil rights cases. This Court and Congress have stated that fee shifting statutes are to be interpreted "*in pari materia*".[6] Thus, contracts regarding environmental, civil rights, and other fee shifting statutes are subject to invalidation regardless of whether or not the client is willing to abide by the terms of the contract, as was the case in *Farmington Dowel Products Co. v. Foster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1969).[7]

Since the statutory fee is only awarded if the client wins, and no statutory fee is awarded if the client loses, the radical result sought by Petitioner—an order prohibiting the attorney in this and consequently any fee shifting case from collecting a fee except the statutory fee—imposes on the attorney and client a forced contingent arrangement. The result of this forced bargain would be that the right to contract for even a standard hourly agreement is abrogated.[8] Attorney and client

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[6] *See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 556, 559 (1986) ("*Delaware Valley I*"); S. Rep. No. 94-1011, 94th Cong., 2d Sess., 6 (1976).

[7] *Farmington* is considered the leading case on the relationship between the statutory and ethical tests which govern fee amounts. In *Farmington*, an antitrust case, the Court held that the statutory and ethical tests for a reasonable fee were different. 421 F.2d at 90. It instructed the district court to determine the "maximum ethically allowable fee," to assess the reasonable statutory fee from defendant, and to require plaintiff to pay only such further amount as would constitute a fee that was not excessive under the ethical standards. *Id.* at 87.

[8] This result raises serious ethical concerns. In 1986 the American Bar Association Standing Committee on Ethics and Professional Responsibility issued Informal Opinion 86-1521, stating that it is unethical for a lawyer not to offer clients alternative fee arrangements before accepting a case on a contingent-fee basis.

should be encouraged—not prohibited from—negotiating fee contracts which best suit the needs and financial circumstances of each case.

Invalidation of fee contracts also unnecessarily interferes with economic regulation which occurs in the legal marketplace. If statutory fees alone were sufficient to attract an adequate supply of attorneys, then these types of agreements would dominate the marketplace. If, however, statutory fees were insufficient consideration, civil rights plaintiffs will have to have some "bargaining chip" to induce attorneys to accept their cases. Traditional bargaining tools which clients can utilize to obtain counsel include contemporaneous hourly agreements, lump sum "retainer" agreements, and contingent fee agreements.

The ruling sought by Petitioner would also interfere with all fee contracts negotiated between civil rights *defendants* and their counsel. This Court has recognized that the civil rights statutes, like "many of the statutes", have "flexible" fee provisions which authorize "the award of attorney's fees to either plaintiffs or defendants". *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 416 (1978).[9] Since either plaintiff or defendant may be a "prevailing party" within the meaning of the civil rights fee statutes, limiting fees to those available under a statutory award would invalidate a broad array of plaintiffs' and defendants' free market contracts. Surely, Congress never intended such interference with the rights of parties to negotiate free market contracts regarding payment for legal representation.

Thus, to interpret the Civil Rights Attorney's Fees Awards Act as precluding private fee agreements between clients and their attorneys would be a substantial burden on those parties' right to enter contracts. In interpreting such

[9] The *Christianburg* standard, although decided under Title VII's fee provision, applies to numerous fee statutes. *See Christianburg*, 434 U.S. at 416 n.7.

legislation the importance of the individual's right freely to enter into contracts should not be overlooked. The importance of the right to contract is underscored by the contract clauses of the Federal and State Constitutions.[10]

While courts and legislatures alike have been more willing to substitute their own judgment of what is a sound and worthwhile business transaction for the judgments of private individuals in the marketplace, this is not appropriate here. As Judge Alex Kozinski stated in a recent opinion:

> Perhaps most troubling, the willingness of courts to subordinate voluntary contractual arrangments to their own sense of public policy and proper business decorum deprives individuals of an important measure of freedom. The right to enter into contracts—to adjust one's legal relationships by mutual agreement with other free individuals—was unknown through much of history and is unknown even today in many parts of the world. Like other aspects of personal autonomy, it is too easily smothered by government officials eager to tell us what's best for us. The recent tendency of judges to insinuate tort causes of action into relationships traditionally governed by contract is just such overreaching. It must be viewed with no less suspicion because the government officials in question happen to wear robes.
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> *Oki America, Inc. v. Microtech International, Inc.*
> 872 F.2d 312, 316 (9th Cir. 1989)
> (Kozinski, J., concurring)

Judge Kozinski's remarks regarding the expansion of tort causes of action into the contract area applies with even greater force to the proposed interpretation of the Civil Rights Attorney's Fees Awards Act. For, if the Court interprets that Act as Petitioner suggests, it will obliterate the free market rights of the parties and their attorneys to enter into private contracts and will place the entire matter of what consider-

[10] Const., Art. I § 10; *see, e.g.*, Cal. Const., Art. I.

ation attorneys will be paid for representing such clients—normally the subject of free negotiation between client and attorney—into the hands of the judiciary. This affront to contract rights should not be lightly embraced by this Court.

II.

ENFORCEMENT OF OTHERWISE PERMISSIBLE FEE CONTRACTS IS CONSISTENT WITH CONGRESS' LANGUAGE AND INTENT

A. The Plain Language of the Statute as Well as the Legislative History Clearly Demonstrate that Congress Did Not Intend to Void the Right to Contract

Petitioner has postulated that the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976[11] supports the abrogation of the right of attorney and client to agree to the terms of an ethically permissible fee contract. To the contrary, the clear language of the statute, as well as its legislative history, belie this view.

It is a fundamental rule of statutory construction that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917). If the language is unambiguous, it is inappropriate to resort to legislative history to interpret the statute. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 431-32 (1986); *Kelly v. Robinson*, 479 U.S. 36, 43 (1986); *United States v. Hohri*, 482 U.S. 64 (1987); 3 C.D. Sands, *Sutherland Statutory Construction*, § 46.01 (4th Ed. 1986).

[11] The Civil Rights Attorney's Fees Awards Act, Pub. L. 94-559, 90 Stat. 2641, as set forth in 42 U.S.C. § 1988.

Just weeks before Section 1988 was enacted, Congress passed the Antitrust Civil Process Act amendments of 1976.[12] During the course of the lengthy debates on the antitrust amendments, the legislators focused considerable attention on the availability of contingent fees for private attorneys. As a consequence, both the House and Senate ultimately agreed to explicitly prohibit private attorneys from collecting contingency fees based on a percentage of monetary relief unless the award of fees is determined by a court. *See* 15 U.S.C. § 15g(1)(A) and (B).

In contrast to the contingent fee prohibition in the antitrust amendments, Congress included no limitation on private fee contracts in Section 1988. In *Crawford Fitting Co. v. J.T. Gibbons*, 482 U.S. 437 (1987), this Court held that Congress had enacted 28 U.S.C. § 1821 as a limitation on the amount of reimbursement a district court may award to a prevailing party for expert witness fees. Thus, Justice Rehnquist aptly observed, "[i]t is . . . clear that when Congress meant to set a limit on fees, it knew how to do so." *Id.* at 442. Likewise, Congress unquestionably knew how to place limits on the availability of fees under a private fee contract, but it did not do so when it passed the Civil Rights Attorney's Fees Awards Act. Petitioners cannot now impute such limitation in the absence of an expression of clear congressional intent.[13]

[12] The Antitrust Civil Process Act Amendments, Pub. L. 94-435, 90 Stat. 1394, 1395, 1396 (1976), as set forth in 15 U.S.C. §§ 15b-h.

[13] Moreover, had Congress intended to limit attorneys' fees under § 1988, it could have imposed a cap on fees as it has in numerous other statutes. *See, e.g.*, Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) ($75/hour in absence of special circumstances); Federal Tort Claims Act, 28 U.S.C. § 2678 (fee limited to 20% of administrative settlement; 25% of judgment); Social Security Act, 42 U.S.C. § 406(a) (fee limited to 25% of award); Coast Guard Act, 14 U.S.C. § 431(c) ($10 maximum); International Claims Settlement Act of 1949, *e.g.*, 22 U.S.C. §§ 1623(f), 1631(j), 1641(p), 1642(m), 1643(k) (10 percent maximum); American-Mexican

Even if reference is made to the legislative history of Section 1988, it readily demonstrates that the primary purpose of the Fees Act was "the promotion of respect for civil rights" rather than the imposition of limits on contract rights, as Petitioner suggests. *See, e.g.*, S. Rep. No. 94-1011, p.5 (1976); *Evans v. Jeff D.*, 475 U.S. 717, 731-32, 89 L. Ed. 2d 747, 106 S.Ct. 1531 (1976). According to the chief proponents of the legislation, the impetus for enacting the Fees Act was to restore the status quo after the Supreme Court decided in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) that attorneys' fees could not be awarded in the absence of a specific authorizing statute. *See, e.g.*, Senate Report No. 94-1011, pp. 1,4,5; House Report No. 94-1558, pp. 2,3,9. The scant commentary cited by Petitioner as criticism of attorneys seeking fees for their work pales in comparison to the strong emphasis Congress placed on encouraging meritorious civil rights actions.

Indeed, both the Senate and House Reports cited the seminal Title VII case, *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), for the proposition that the reasonableness of fee awards under § 1988 should be determined in accordance with the 12 standards articulated by the *Johnson* court. S. Rep. No. 94-1011, p.6 (1976); H.R. Rep. No. 94-1558, p.8 (1976). It is noteworthy that among the 12 factors for determining fee awards is "whether the fee is fixed *or contingent.*" *Johnson, supra*, at 718 (emphasis added). Thus, Congress was not only aware that attorneys separately contract with their clients for fees on a contingency basis but also affirmed its support for the practice.

(footnote 13 continued from page 15)

Chamizal Convention Act of 1964, 22 U.S.C. §277d-21 (10 percent maximum); Japanese-American Evacuation Claims Act of 1948, 50 U.S.C. App. § 1985 (10 percent maximum); Organic Act of Guam, 48 U.S.C. § 1424c(f) (5 percent maximum); Military Personnel and Civilian Employees Claims Act of 1964, *as amended*, 31 U.S.C. § 3721(i) (10 percent maximum); Servicemen's Group Life Insurance Act, 38 U.S.C. § 784(g) (10 percent maximum).

Congress' intent to add statutory fees to the then existing fee incentives available to clients is also evidenced by reference to the cases where the fee standards were "correctly applied." *Blum v. Stenson*, 465 U.S. 886, 893-4 (1984) (quoting with approval from legislative history). In *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), plaintiffs were able to obtain counsel through use of a lump sum or "retainer" payment. The fee agreement provided that plaintiffs would pay counsel "$5,000 plus whatever funds they could raise from interested third parties." *Id.* at 686. Pursuant to this fee contract, counsel was paid $8,500. *Id.*

Similarly, in another case cited with approval by Congress, *Swann v. Charlotte-Mecklenburg Bd. of Education*, 66 F.R.D. 483 (W.D.N.C. 1975), counsel for plaintiffs received some payment of fees and costs from the NAACP Legal Defense and Educational Fund, Inc. *Id.* at 486. The Court specifically acknowledged the existence of the private fee arrangement. *Id.*

If Congress had desired to regulate private fee agreements, it would have evidenced this intent by placing a dollar amount limit or percentage "cap" on civil rights attorneys' fees, as it has done in numerous other fee statutes.[14] The absence of these "supervisory" fee provisions in the Civil Rights Attorney's Fees Awards Act further demonstrates that the statutory fee provision was not intended to abrogate private arrangements negotiated by the client and his or her attorney.

B. Enforcement of Respondent's Fee Agreement Is Consistent with Prior Supreme Court Rulings

In each of four recent decisions addressing issues arising under fee shifting statutes, this Court has acknowledged the

[14] *See, e.g.*, 28 U.S.C. § 2412(d)(1)(A) (fee awards under Equal Access to Justice Act limited to $75/hour in absence of special circumstances); Federal Tort Claims Act, 28 U.S.C. § 2678 (fee limited to 20% of administrative settlement; 25% of judgment or settlement); Social Security Act, 42 U.S.C. § 406(a) (fee limited to 25% of award).

viability of fee agreements privately negotiated by plaintiffs and their attorneys. In *Crawford Fitting*, the right to privately contract for fees was preserved. In that case, the Court limited reimbursement to a prevailing party for expert witnesses to $30.00 per day. Accordingly, a federal court is bound by the limits of §§ 1821 and 1920 "absent explicit statutory *or contractual* authorization" *Id.* at 445 (emphasis added).

Likewise, in *Pennsylvania v. Delaware Valley Citizen's Council*, 483 U.S. 711 (1987) ("*Delaware Valley II*"), the Court stated that "the fee contract between the client and his attorney should be taken into account when determining the reasonableness of a fee award . . . ." *Delaware Valley II, supra* at 723. In its discussion of the nature of § 1988, the Court in *Delaware Valley II* also noted that, because a losing plaintiff is entitled to no fees, his or her attorney will be paid nothing unless "the attorney has an agreement with the client that the attorney will be paid, win or lose" *Id.* at 715. Indeed, in *Delaware Valley II* all nine Justices noted with approval the availability of private fee contracts.[15]

In *Blanchard v. Bergeron*, ___ U.S. ___, 109 S.Ct. 939 (1989) this Court again reaffirmed the viability of private fee agreements by holding that a district court cannot limit the court awarded attorneys' fees to an amount provided in a contingent fee agreement. Thus, "a contingent fee agreement is not a ceiling upon the fees recoverable under § 1988", 109 S.Ct. at 946, and a private agreement may be a factor in determining the reasonableness of court awarded fees. 109 S.Ct. at 944. However, *Blanchard* also makes it clear that a prevailing party and his or her attorney can contractually agree to a higher fee than the statutory award, and that will not alter the losing party's obligation to pay court-awarded

[15] Justice O'Connor concurred in this portion (part II) of Justice White's plurality decision. *Id.* at 734 (O'Connor, J. concurring). In addition, Justice Blackmun recognized with approval the availability of privately negotiated contingent fee contracts. *Id.* at 737 (Blackmun, J. dissenting).

fees. 109 S.Ct. at 945. Thus, Petitioner's dramatic appeal to "balance the scales" by invalidating all fee agreements is no more than empty rhetoric. *Blanchard* has, in fact, already equalized the equation. Defendants in civil rights cases are only liable for the amount of the statutory fee award, no more no less, regardless of the private contract between client and attorney.

Finally, although this Court did not directly address the issue of fee agreements in *Evans v. Jeff D.*, 475 U.S. 717 (1986), implicit in its determination was an acknowledgement of the practice of entering into private fee agreements. Reviewing congressional intent, the Court observed, "[Congress] did not prevent the party from waiving this eligibility [for attorneys' fees] any more than it legislated against assignment of this right to an attorney. . . ." *Id.* at 730-31. The Court added that while "Congress expected fee shifting to attract competent counsel to represent citizens deprived of their civil rights, *it neither bestowed fee awards upon attorneys nor rendered them non-waivable or non-negotiable*". *Id.* at 731-32 (emphasis added). As such, if the right to statutory fees can be used as "a bargaining chip" to negotiate an advantageous settlement agreement, it would be an anomalous result to limit a prevailing attorney to statutory fees. Surely, if a contract can be negotiated which allows the plaintiff to waive statutory fees, a contract can be negotiated which allows use of one of the time-honored means for representation of clients with little or no financial resources—the contingent fee agreement.

III.

EXPERIENCE UNDER SECTION 1988 COUNSELS AGAINST INVALIDATING FEE CONTRACTS

The available evidence counsels against interpreting § 1988 to limit the recovery of fees pursuant to a private

contract. Despite judicial and popular perceptions to the contrary, § 1988 has not attracted a mass of attorneys to bring previously neglected civil rights actions. If the possibility of fee awards attracted attorneys to constitutional tort litigation, one would expect civil rights filings to increase after the effective date of § 1988, October 1, 1976. Yet the most comprehensive study of civil rights filings finds that, after enactment of § 1988, there was a general nationwide *decline* in general non-prisoner civil rights filings as a percentage of all federal civil filings. Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 666 (1987) (Table III) [hereinafter referred to as *Reality*].[16]

Table III from *Reality* compares the annual increase in non-prisoner civil rights filings with the annual increase in all federal civil filings from 1975 to 1984. The civil rights category that encompasses most § 1983 and other civil rights claims is Administrative Office Category number "440", which is labeled "other civil rights".[17] Table III reveals that, between 1975 and 1984, this category *declined* as a fraction

[16] Nothing in the unrefined, generalized statistical information presented by Petitioner supports a total abandonment of the right to contract. Petitioner's raw data is precisely the type of generalized information criticized by this Court in its recent decision in *Wards Cove Packing Co. v. Atonio*, ___ U.S. ___, 109 S.Ct. 2115 (1989). Unlike the data in the study relied upon herein, there is no basis for eliminating from Petitioner's material any of a number of factors which could explain differences in filing statistics such as changes in substantive law, societal attitudes about litigation in general, or variations in workforce demographics. Any of these factors could well explain the figures cited by Petitioner, and there is no reason to extrapolate from that data the conclusion that Petitioner's figures are explained solely by court decisions regarding contingent fee contracts.

[17] This category excludes employment claims, most of which are covered by their own fee statute which has been part of Title VII since its enactment in 1964. The data for Table III come from Administrative Office of the United States Courts, 1984 Annual Report of the Director 145 (Table 25).

of the federal civil docket. Civil rights filings either remained constant or decreased relative to all civil filings in all but two years during the ten-year period and in only one of those two years did the relative increase exceed five percentage points. If § 1988 generated a spate of civil rights actions in the decade after its enactment, they are undetectable through observation.

Similar findings apply with respect to prisoner civil rights litigation. *Reality*, 72 Cornell L. Rev. at 666-67 & Table IV.[18] Indeed, in the prisoner area there is evidence that § 1988 has provided insufficient incentives to attract private counsel to meritorious prisoner claims. Schwab & Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of The Attorneys Fees Statute and The Government as Defendant*, 73 Cornell L. Rev. 719, 770-74 (1988).

It is true that the absolute level of civil rights filings increased during the reported period. But, given the increase in population and general litigation (as measured by the increase in other civil filings), the absolute level of civil rights filing activity is less persuasive evidence than the relative level. If § 1988 were inducing lawyers to file civil rights cases in extraordinary numbers, there should have been an increase in both the absolute and relative level of civil rights filings.

[18] Further evidence that § 1988 had modest effects on filings is presented in Schwab & Eisenberg, *Explaining Constitutional Tort Litigation*, 73 Cornell L. Rev. 719 (1988).

CONCLUSION

There exists an abundance of well-financed and experienced attorneys available to defend civil rights cases at guaranteed hourly rates. The principal congressional objective in providing for reasonable attorneys' fees in civil rights litigation, however, was to provide an incentive to competent attorneys to accept these difficult but socially important cases on behalf of plaintiffs. H.R. Rept. No. 94-1558, 94th Cong. 2d Sess. 6 (1976); S. Rep. 94-1001, 94th Cong. 2d Sess. 4 (1976). The purpose was not to provide mere representation to plaintiffs, but representation by highly skilled attorneys experienced in this complex area of law who are sufficiently well-capitalized to be able to persevere through protracted litigation. Former Judge Charles B. Renfrew captured this purpose well:

> Litigation in this area often involves extraordinarily complex legal and factual issues that many attorneys would simply be unable to handle successfully. The important individual and societal issues at stake in such litigation may not be adequately protected unless attorneys possessing the requisite skills can be induced to take Title VII cases. Many able attorneys, no doubt, are willing to forego some financial rewards because of the psychic satisfaction of advancing a cause in which they believe. However, the enforcement of the rights guaranteed by Title VII cannot be entrusted to such altruistic motives. *Lockheed Minority Solidarity Coalition v. Lockheed Missiles & Space Co.*, 406 F. Supp. 828, 830 (N.D. Cal. 1976)

The lofty congressional purposes of providing competent representation for victims of civil rights abuses would be ill served by the invalidation of the right to contract sought by Petitioner. The interference with the economics of the legal marketplace and the contract rights of the parties sought by Petitioner should not be indulged by this Court.

Dated: December 15, 1989

Respectfully submitted,

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PROOF OF SERVICE

Case: Juan Francisco Venegas v. Michael R. Mitchell
U.S. S.Ct. No.: 88-1725

STATE OF CALIFORNIA)
) SS
COUNTY OF ALAMEDA)

I am a citizen of the United States and have an office in the county aforesaid. I am over the age of eighteen years and not a party to the within entitled action. My business address is 505 Fourteenth Street, Suite 1150, Oakland, CA 94612.

On December 16, 1989 I served the within:

BRIEF OF AMICI CURIAE SAPERSTEIN & SELIGMAN, CALIFORNIA TRIAL LAWYERS ASSOCIATION, CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION, PLAINTIFFS EMPLOYMENT LAWYERS ASSOCIATION, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, EQUAL RIGHTS ADVOCATES, CENTER FOR LAW IN THE PUBLIC INTEREST AND PUBLIC ADVOCATES, INC.

by placing a true copy thereof enclosed in a sealed Federal Express envelope with postage thereon fully prepaid, in a Federal Express Depository at Oakland, California addressed as follows:

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Los Angeles, CA 90010

by causing a true copy thereof to be transmitted via telecopier to:

Richard Mosk
1901 Avenue of the Stars, Suite 850
Los Angeles, CA 90067

I, Wanda Ruth Smith, declare, under penalty of perjury, that the foregoing is true and correct.

Executed on December 16, 1989 at Oakland, California.

Wanda R. Smith
Wanda Ruth Smith